THE GROUNDS AND RUDIMENTS OF LAW

W. T. HUGHES

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OF

LAW

BY

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The datum posts of the law are its maxims and illustrative cases, which are the prescriptive constitution.

Melius est petere fontes quam sectari rivulos.

Regula pro lege si deficit lex.

"The Roman still holds dominion over this world by the silent empire of his law."

VOLUME II

CHICAGO

PUBLISHED BY THE USONA BOOK CO.

1908

Press of the BROWN-COOPER TYPESETTING Co., Chicago, Ill.

FOREWORD

Important discussions can be indefinitely extended, and we submit if they cannot be intensely condensed. A large volume of matter can be easily culled on nearly any twig of the law; on some larger branches like *Negligence, Corporations, Insurance, Crime, Criminal Defences, Equity* and *Real Estate* rows of books are found. But condensation around the roots and heartwood is an opposite way of gathering; this requires study and a careful setting. To illustrate let us observe that Bacon's first maxim, *In jure non remota causa sed proxima spectatur* (In law the immediate and not the remote cause of any event is considered), involves discussions which if gathered would fill great volumes. The content of a book is more easily fattened than condensed; this will appear by referring to *Hadley v. Baxendale, Gilson v. Delaware Canal Co., Gibney v. S., Guille v. Swan* (a case generally cited with the "*Pickaxe Case*," the "*Squib Case*" and the "*Drug Case*"), *Fent v. R. R., Heaven v. Pender* and cognate cases. Looking from *In jure*, etc., noting its tremendous ramifications throughout the body of the law, and focusing these discussions is an effort very unlike culling a few of the cases that illustrate the application of that maxim and offering a reprint of these cases for the content of a book or of a series of books. It is from these viewpoints that this, the least of books in appearance, is offered. From these viewpoints a distinctive work is presented, which is a key to the library. For this key, the lawyer who cannot afford room for the long lines of constantly changing and rapidly growing digests, encyclopedias and gatherings of case law will find this little book of standard and fixed matter particularly valuable.

Another illustration will be found in *Ignorantia legis neminem excusat.* Under this most important maxim vast and varied discussions are indicated. In this small volume will be found many other like efforts. Some of these are directed at setting before the reader subjects like HUSBAND AND WIFE, INFANTS, APPELLATE PROCEDURE and CODES. *See* also, *Idem agens et patiens esse non potest* (Keech v. Sandford).

From many viewpoints are claims for a prescriptive constitution. These claims must find support in what is observed in relation to *Appellate Procedure, Church, Christianity, Galbraith, Evans v. Johnson, Audi, Ignorantia legis, Certainty, Conserving Principles, Construction, Harrow, In præsentia, Kirven, Kollock, Illinois, Trist:* 214, *C. v. Hess:* 215, *S. v. Bolden:* 216, *Dovaston:* 217, *Oakley:* 222, *Indianapolis:* 223, *Bates:* 225 and *S. v. Townley:* 225*a* (cases so numbered are in Vol. III).

The view is offered that a constitution is moored to a few fundamental principles, and that these can be denounced and abrogated by ignorant or insidious construction *(Cujus est instituere ejus est abrogare);* that protection has no greater bulwarks of defence than the fundamental maxims of procedure. *See* GOVERNMENT; CODES; FIRST LESSONS; INDICTMENTS; *Ignorantia legis; In præsentia majoris cessat potentia minoris.* From necessity—for protection, for reason, for public policy, for certainty there must be vindicated the prescriptive constitution. Upon its recognition depend the utility and usefulness of jurisprudence.

PROCEDURE. Particular attention has been given matters relating to the leading subjects of the law. This will appear from what has been gathered and set relating to Procedure (Evidence, Pleading and Practice). What relates to Procedure has been made prominent from a consideration of its conserving principles, *q. v.*, from these it is conceived and defined. *See* APPELLATE PROCEDURE; GOVERNMENT; CONSTITUTIONAL LAW; CODES; HARROW; CERTAINTY; INDICTMENTS; JURISDICTION; MANDATORY RECORD; *Ignorantia; In præsentia majoris.* Herefrom may be gathered the very important fact that there are three maxims that tremendously affect Procedure, namely, *De non apparentibus et non existentibus eadem est ratio, Frustra probatur quod probatum non relevat* and *Verba fortius accipiuntur contra proferentem* (Vol.

IV). Illustrations of these maxims are always of much consequence to practitioners, who for a generation have been but very little favored with views from the prescriptive constitution—the fundamentals of Procedure. See *Frustra;* Harrow; ILLINOIS; *Actore; Ad quæstionem; Allegans; Audi; Boni; Certum; Cessante; Consensus; Coram Judice; Cursus; Debile; De non; Expressio eorum; Expressio unius; Fabula; Falsus; Favorabiliores; Frustra; Idem agens; Ignorantia; In jure; In pari; In præsentia; Interest reipublicæ.*

The foregoing are among the fundamental principles of Procedure, and they will be found to be parts of the prescriptive constitution from antiquity. This fact will appear by considering *Idem agens, De non apparentibus, Frustra probatur* and *Verba fortius. See* INDICTMENTS. The leading maxims of Procedure are introduced in relation to ABATEMENT, APPELLATE PROCEDURE, CODES, CONSTRUCTION and CONSTITUTIONAL LAW. *See* INDICTMENT; *Ignorantia legis.* In relation to many topics are discussed *Audi, De non apparentibus, Frustra* and *Debile. See* Windsor: 1; Munday: 79 (Vol. III); Sache (Minn. Vol. IV); Harrow.

The above maxims should be studied in relation to what is observed of *Ignorantia legis,* APPELLATE PROCEDURE, INDICTMENTS, CODES, CONSTRUCTION, ILLINOIS; Dovaston: 217 (Vol. III); *Verba fortius accipiuntur contra proferentem* (Vol. IV).

The maxims and leading cases and principal rules relating to the following subjects are afforded: Abatement; Abstracts of Record; Aider (Bowman); Allegations [limit and control proof; Jurisdiction; Kollock; Adams v. Gill (Ill.); Chitty v. R. R. (Mo.)]; Appellate Procedure (courts of appellate procedure; means, incidents, implications of; what ought to be of record; four important documents; mandatory and statutory records; three leading maxims, rules, p. 377); Argument (how to find and cite cases); Assignment of Errors; Atlantic; Attorneys; *Audi;* Bill of Exceptions (statutory record); *Brewer* (new trial); Certainty; Codes (10 pages); Collateral Attack (4 pp.); *Consensus;* Conserving Principles (enumeration of. See *In præsentia;* JURISDICTION); Constitutional Law; Constructive Notice; Contempts (Hale v. S.); Continuance; *Coram judice; Coram non judice;* Costs; Continuity (Harrow); Counterclaim (*see* Kirven); Courts; Court of Record; Crain (right record essential); Crater (admissions control denials); Creditors' Bills; Crogate's Case (jurisdiction of inferior courts must appear); Crowns (code judgments may be impeached); *Cursus curiæ; Custodia;* Damages; Davidson v. New Orleans (due process of law); Dead; Dead Issues; *Debile* (*Ignorantia*); Defaults; Defendants; Delay; Demand; Demurrer; Denial (Issue—Admissions control denials. Hannen); Departure; Deputy; Description (identification); Devine (aider); Dictum; Directing a verdict (see *Ad quæstionem*); Discovery; Division of state power (Lane v. Dorman; *Ignorantia*); Draper (code, fundamental principles repeated); Due Administration of Justice; Due Process of Law (*see* FEDERAL QUESTION; Howard v. Kentucky—appearance of prisoner; Hulbert v. Chicago—Due Process of Law Record; Mandatory Record); Election of Remedies; Elisors; Emerson v. Nash (joinder of causes; splitting of causes; Kirven; *Interest reipublicæ;* King v. R. R.); Equivocal objections (appellate procedure; *Interest reipublicæ*); Error; Exceptions; Executions; *Fabula;* False Pleading; *Favorabiliores;* Federal Courts; Federal Question [states inferior; Kern; Kirven. *See* also, Howard v. Fleming; Howard v. Kentucky; Felts v. Murphy; Pariaso v. U. S. (Vol. IV)]; Frauds and Perjuries; Garnishment; General Demurrer (motion in arrest; collateral attack); Haupt v. Simmington (depends on mandatory record; *Ignorantia*); Galloway (substance waived); General Denial; General Issue (Gardner v. Buckbee); Generalities; Grace v. Mitchell (regular process; *Ignorantia*); *Habeas Corpus;* Hahl v. Sugo (code technicalities. *Glossa viperina.* See *Viperina,* Vol. IV); Harrow v. Grogan (Ill.—construction of records); Hahn v. Kelly (Calif.); Hardy v. Sumers (important rule, injunctions); Hume v. Robinson (Colorado cases); Harvey v. Brydges (*Verba fortius;* right of owner to retake his land from occupant); Harshey (appearance of attorney not conclusive); Hodges v. Kimball (directing verdicts); Homesteads; *In æquali melior; In pari;* Injunctions; Inspection of Documents; Issues; Judgments; Jurisdiction; Justification (*see* JURISDICTION; CONSERVING PRINCIPLES); Kern (removal of cause to federal court; effect); King v. R. R. (*see* Emerson;

Splitting causes; Joinder of causes); Kirven (recoupment; *res adjudicata;* important rules).

Observations on states. *See* CALIFORNIA; COLORADO; ILLINOIS; INDIANA; CODES; MISSOURI, Vol. IV; OHIO, Vol. IV.

Evidence. The constitutional or record rule: *"What ought to be of record must be proved by record and by the right record";* this is introduced in Appellate Procedure, Abatement, Codes, *Ignorantia, In præsentia,* and Jurisdiction. This rule is a conserving principle. § 104, Gr. & Rud. Records are irrefragable. Kirven; Crain.

Allegata et probata must correspond. *Frustra;* CODES; JURISDICTION; *Expressio unius.* Variances and departures are not allowed. CODES; CONSTITUTIONAL LAW.

Every one is presumed innocent until proven guilty. *Actore;* Coffin. *See* EVERY; PRESCRIPTIVE CONSTITUTION (Vol. IV).

Every one is presumed to intend the natural, direct and probable consequences of his act. Hadley; Guille. A fault binds its own author. *See* EVERY; HEARSAY; *Omnia præsumuntur rite; In jure;* Harrow; Benton; Bray.

Under these various topics important rules are found: *Actore;* ADMISSIONS; AFFIDAVITS; AIDER; ALIBI; ALTERATION; *Allegans;* ALLEGATIONS (Admissions, Denials, Issues, Estoppel); AUTHORITY; AUTHENTICATION; Benton; Brooks; BEST EVIDENCE; Bromage; BURDEN OF PROOF (see *Actore*); CERTAINTY; CHARACTER; CIRCUMSTANTIAL; CONFESSIONS *(Nemo tenetur;* Hale v. Henkel); CONTINUITY (Harrow); CORPUS DELICTI; Crain; CROSS EXAMINATION; *Cuilibet in sua arte* (expert evidence); CUSTOM; CY PRES; DISPOSITION; DEPARTURE; COPIES (Duvall); DYING DECLARATIONS; EARNEST; EQUITABLE ESTOPPEL (Horn v. Cole; Horn v. Baker; *In præsentia);* ESTOPPEL (Freeman v. Cook; Gardner v. Buckbee); ESTOPPEL BY DEED (Christmas v. Oliver. Tenant cannot dispute landlord's title. See *Allegans);* EVERY (several presumptions. First lessons); EVIDENCE (3 pages); EXHIBITS (copy, examined copy, authentication); *Extremis probatis; Ex uno; Falsus in uno* (impeachment); *Favorabiliores;* FLIGHT (Circumstantial); *Fiunt enim* (Oral Evidence); FRAUDS AND PERJURIES; Freeman (Estoppel); Fries (practice as to self incrimination. Hale v. Henkel); Harrow (regularity presumed; Hahn); HANDWRITING; ADMISSIONS IN PLEADINGS. *See* ALLEGATIONS; ISSUES; DENIALS; ESTOPPEL OF RECORD. Returns of officers not conclusive (Harrow); Greenough (privileged communications); IMPEACHMENT *(Falsus);* INSPECTION OF DOCUMENTS; JUDICIAL NOTICE. Self incrimination. Hale v. Henkel *(Nemo tenetur. See* CONFESSIONS; RES GESTAE; *Expressio eorum; In jure).*

Mandatory Record: Harrow. Statutory Record: Harrow.

What ought to be of record must be proved by record and by the right record. *See* APPELLATE PROCEDURE; *Audi;* JURISDICTION.

Res ipsa loquitur. Ellis v. U. S.; L.C. 211, Vol. III.

Pleadings: Defined. *See* GOVERNMENT; JURISDICTION; CERTAINTY; INDICTMENTS; *Ignorantia;* Adams v. Gill (Ill.); FLORIDA; Kollock (Code).

Description of a particular thing essential for jurisdiction. *See* CONCLUSION; ALLEGATION; IDENTIFICATION; JURISDICTION; GOVERNMENT; APPELLATE PROCEDURE; *Ignorantia; Frustra;* CODES; CONSERVING PRINCIPLES; CAUSE OF ACTION. *Allegata et probata* must correspond. *See Frustra;* DEPARTURE; JURISDICTION; Dorn (variances permitted in Illinois). Facts not conclusions of law must be pleaded. *See* ABATEMENT; CONCLUSIONS.

General demurrer, motion in arrest and collateral attack test defects of substance at all stages. See *Debile; Ignorantia;* APPELLATE PROCEDURE; CODES.

Every presumption is against a pleader. Draper (Code); Buck (U. S.); Harvey v. Brydges; *De non apparentibus; Verba fortius* (Vol. IV). *See* EVERY.

An authority must be pleaded. Buck v. Colbath; JUSTIFICATION; RES ADJUDICATA; ESTOPPEL; *De non.*

Admissions in pleadings (Hannèn; DENIAL). *Actore; Ad damnum* (prayer; Hahl v. Sugo: N. Y. Code); Aider; Allegations; Alternative; *Ambigua;* Amendments; Answers (defences must be pleaded. Gardner; Hall v. Henderson; *De non apparentibus; Verba fortius);* Argumentative *(see* CONSERVING

PRINCIPLES; Bell v. Brown); Bill of Particulars (C. v. Snelling; Cryps); Captions (Jackson v. Ashton); Certainty; Common Counts; Cross Complaint; Conclusion of Law; Counterclaim (Kirven); Counts; Cryps (bill of particulars—rules); Defences; Defendants; Demurrer; Denial; Departure; Description (Identification); Dilatory (Abatement); Doll v. Good (denials—code); Draper (certainty—code); Dorn (variance, can be waived in Illinois); Duplicity; *Exceptio falsi* (false, sham pleading). Facts must be pleaded *(Res adjudicata;* Gardner; Draper); *Frustra;* Frauds and Perjuries; Identification; Hypothetical; *Ignorantia; In præsentia;* Indictments; Issues.

Practice. *Ad quæstionem facti;* Abatement (dilatory); Acquiescence *(Consensus);* Appeal Bonds; Appeals; Appearance (presence of prisoner at trial. Howard v. Kentucky); Appellate Procedure; Argument (Appellate Procedure); Arrest; Assignment of Errors; Atlantic; Attachment; Awards.

Bail. Castione (fugitives from justice; extradition); Certificate of Doubt; Certificates; *Certiorari;* Challenge of jurors; Change of Venue; Commencement of Suit; *Consensus;* Description; Dismissal; Exemptions; Execution Sales; Extradition; Fries (self incrimination—practice—Hale v. Henkel); Issues; Judgments.

EQUITY. See *id.* (3 pages); Bills in Equity; *Bonus judex;* Cancellation of Instruments (mistake; fraud); Dyer (Trusts); Equitable Conversion; Harding (Precatory Trusts); Hunt (Mistake—*Ignorantia);* Gordon (concealment); He who comes into court *(see* EQUITY); He who has done iniquity shall not have equity *(In pari); Idem agens et patiens esse non potest* (Keech v. Sandford).

CONTRACT. Defined; General *resume.* §§ 280-291, Vol. I; L.C. 301-417, Vol. III.

A request essential. Gill v. U. S.; *Id quod nostrum; Res inter alios.* Title to property. Assent *(Non hæc in fœdera veni;* Consensus; Waiver; Gill v. U. S.). Contract by letter (Burton v. U. S.); Mutuality *(Expressio unius;* Duress); Concealment (Gordon; Carter v. Boehm); Consideration *(Ex nudo).*

Competent Parties, Aliens, Husband and Wife, Married Women, Infants, Insane, Idiots, Corporations (Hill; Hitchcock—*Ultra vires).*

Judgments. Successive suits on (Hummer). *See* JUDGMENTS.

Deeds. Christmas v. Oliver; Cooch v. Goodman; Elwell v. Shaw; Jackson v. Cleveland; Heaton v. Hodges (construction); Hibblewhite; Gibson. Filling blanks in deeds. Hibblewhite; Angle. *See* AGENCY.

Simple Contracts are commercial paper and all other contracts not under seal. (Cooch; Hibblewhite.)

Illegality of subject-matter. *In pari; Ex causa turpi;* Bartlett v. Viner; Collins v. Blantern; *Ex pacto illicito non oritur actio; Ex dolo malo; Id quod nostrum.*

Certainty. See *Id.;* FRAUDS AND PERJURIES; COMMERCIAL PAPER.

Commercial paper. Exceptional rules. *See* COMMERCIAL PAPER.

Fraud. See *Ex dolo; Caveat emptor;* CATCHING BARGAINS (Chesterfield); Concealment (Carter; Gordon); Promise to marry for a gift (Gift); *Bona fide* purchaser (Bell v. Twilight; Bentley).

Aliens. Allen v. Flood (enticing one to break a contract with a third person is actionable. Lumley v. Gye; Lynch v. Knight: enticing wife, Vol. IV).

Anticipatory breach; Assent (mutuality); Assignments *(Assignatus);* Notice of assignment (Compton v. Jones); Grain (partial assignments); Bailments; Bailey v. Phila. (compromise as a consideration); Bentley (thief can give no title); Billings (suicide cannot recover insurance); Bill of Lading; *Bona fide* purchaser; Boydell (several writings—*Ut res magis);* Breach of contract; Brown v. R. R. (carriers liable for remote consequences—Hadley); Callisher (forbearance as a consideration); Catching bargains (Chesterfield —undue influence); Carriers (bills of lading; tickets); *Caveat emptor* (concealment—Carter v. Boehm—Gordon—Fraud—Warranty); Chattel mortgages; Cherry v. R. R. (tickets—contracts by—*Ut res magis);* Clayton (renewal of leases—covenants—implied contracts); Collins v. Blantern (illegality, when a defence to a specialty).

Commercial paper (2 pages); Compounding offences; Compromise; Conditional Sales; Consideration *(Ex nudo);* Copyright; Corporations (Hill); Hitch-

cock (estoppel—*Ultra vires);* Craig v. Van Bebber (infants—contracts). Confusion and accession. Title to property cannot be lost without its owner's consent. Bentley; Bull; Jewett; *Jus publicum;* Joint Contracts; Crowther (forbearance as a consideration—Baily); Dartmouth (charters as contracts—Impairing obligations); Dalby (Insurance—cumulative recoveries); Damages; Dayton (payment—giving bill or note); Deeds (Cooch; Hibblewhite; Jackson; Collins; Gibson—*Ex nudo).* Impairing obligations (Dartmouth; Graham v. Folsom—*Ex post facto;* Retrospective; Constitutional Law; Galbraith; Fletcher v. Peck); Dickinson (officer's salary not a subject of contract); Divorce (Marriage; Husband and Wife); Duress.

Elwes (fixtures); Estoppel (*Allegans;* Landlord and Tenant—Horn v. Cole); *Ex maleficio non oritur actio (Crimen omnia ex se nata vitiat*—Bentley); *Ex turpi causa; Ex dolo malo; In pari.*

Fiunt enim (oral evidence inadmissible to affect a writing); *Expressio unius;* Fletcher v. Peck (impairing obligation of contracts. Dartmouth; Graham v. Folsom); Fraud *(Ex dolo; Crimen omnia);* Frauds and Perjuries; Fraudulent Conveyances; Gifts; Goodwill (sale of); Godsall (life insurance a contract of indemnity); Guaranty; Hadley v. Baxendale (remoteness—privity—damages); Hazleton (Lobbying contracts); *Ignorantia legis* (mistake—Gordon—Hunt—*Caveat emptor);* Implied Contracts *(Expressio eorum;* Bright; Clayton; Galbraith—fundamental principles annex themselves—prescriptive constitution; Langridge; Thomas v. Winchester; Winterbottom, Vol. IV); judgments have many implications *(see* FUNDAMENTAL PRINCIPLES).

Incidents. *Expressio eorum; Accessorium;* Fixtures; Accretion. One is presumed to intend the natural, direct and probable consequences of his act. *In jure;* Thomas v. Winchester. Obligations implied from deceit, fraud, tort. Hadley; Langridge; *Actio personalis.*

Infants. Craig; Gilson v. Spear (infant liable for tort, but not on contract). *In pari (See* ILLEGALITY; *Ex dolo; Crimen omnia;* Hazleton; Hegarty; *Jus publicum);* Insurance (Dalby; Godsall; Billings); Joint contracts; Langridge (contract between two for the benefit of a third); Lawrence v. Fox (Privity; Remoteness; *In jure;* Thomas v. Winchester—sale of drug—belladonna—*See* Vol. IV; Winterbottom, Vol. IV).

AGENCY. §§ 298-303, Vol. I *(resume).* A great rule of agency is presented in *Idem agens et patiens esse non potest* (Keech v. Sandford).

Government is only an agency (Allen v. Jay; American Print Works v. Lawrence); its powers are construed from original covenants of society (Galbraith; JURISDICTION; Beard); Implied—imputed—agency (Husband and Wife; Coercion; Infants; Hitchcock v. Galveston); Clothing one with appearances of authority binds *(see* AGENCY); Agent must account for benefits derived from fraud (Angle); General and special agents (Batty; Clark v. Des Moines); Custom (Goodenow); Agent's liability to third persons (Harriman); Death revokes agent's authority (Hunt); Admissions of agents (Kirkstall); Factors (George v. Claggett); Fellow servants (Farwell); *Respondeat superior* (Hay); Constitutional limitations of authority (Beard. *See* JURISDICTION).

CRIME. Defined: Maxims: Cases. §§ 291-294, Gr. & Rud.

Authority to establish crime. Burton v. U. S. *See* POLICE POWER, Vol. IV. From the maxim, *Ignorantia legis neminem excusat,* much is suggested that relates to crime; therewith is mentioned self defence and the leading maxim of criminal law, namely, *Actus non facit reum nisi mens sit rea.*

The intent and the act are the leading elements (Burton v. U. S.; C. v. Mash; C. v. Moore; Ellis v. U. S.); Insanity is a defense. Consent to criminal act is a matter of extended discussions (Hegarty); also the infant's liability (Godfrey v. S.); also the wife's coercion (C. v. Neal); Self defense (Aldrich v. Wright; C. v. Selfridge; *Domus sua);* Arson; Assault and Battery (Hegarty); Attempts; Compounding offences; Concealed weapons; Conspiracy; Consent (Hegarty); Contempts (Farnam; Hale v. S.); Counterfeiting; *Crimen omnia* (Bentley); Cruelty to animals; Evidence relating to *(see* EVERY); Extortion; False Pretences (cheats); Flag (advertising by); Forestalling; Forgery; Former Jeopardy (Burton); Consecutive prosecutions (Hughes v. P.); Homicide; Larceny.

Penal statutes are strictly construed. Ellis v. U. S.

TORT. Defined, § 291, Vol. I. *See* also, Blyth; NEGLIGENCE (Vol. IV). The definitions of crime and tort show a close relationship. The maxims and cases cited in §§ 295, 296, Vol. I, will be found in this, and Vols. III and IV.

Fletcher v. Rylands and *Guille v. Swan* involve the principle of the *Squib Case.* They involve an application of *In jure non remota* which is a principle ramifying the entire body of the law. *See* EVERY; DAMAGES; NEGLIGENCE (Vol. IV); Hay; *Sic utere* (Vol. IV).

Animals; Arrest; Baily v. N. Y. (corporations, when liable for negligence); Bird v. Holbrook (setting spring guns); Blyth (negligence—tort defined); Brown v. R. R. (liability of carriers; *In jure);* Brown v. Kendall *(Actus Dei);* Bull v. Griswold (a trespasser can give no title; *Id quod nostrum);* Burrows (concurrent negligence—Davies); Busteed (judicial immunity); Butterfield (contributory negligence); Campbell v. Race (necessity as a defense); Carter v. Towne (selling dangerous substances); Damages; Davies v. Mann (contributory negligence—Burrows; *Volenti);* Death *(Actio personalis);* Defamation; Deceit; Dixon v. Bell (negligent selection of servant; *In jure);* Dogs; *Eum qui* (defamation); Evansville (nuisance by corporations); *Ex dolo malo;* Exemplary Damages; False Imprisonment; Farwell (fellow servant's negligence); Fent (fires—remoteness; privity); Fire; Firearms; Fletcher v. Rylands (Squib Case); Fraud; Gibney v. S. *(In jure);* Heaven *(In jure—Volenti);* Hegarty *(Volenti);* Hill (Corporations); Husband and Wife (Coercion); Indemaur (dangerous premises); Infants; Insane (Krom); Jewett (a trespasser can give no title—*Crimen omnia*—Bentley); Kirkwood (joint trespassers); Master and Servant *(see* Harriman; M'Manus, Vol. IV); Relation of tort to other branches of the law (see *In jure;* Langridge); Right of owner of land to take possession from occupant (Harvey v. Brydges; Taylor v. Cole, Vol. IV); *Volenti non fit injuria* (Davies; Gill v. U. S.; Heaven; Hegarty).

CONSTRUCTION. §§ 104-123, 297, Vol. I; L.C. 214-260, Vol. III. Upon construction depend the congruity and usefulness of jurisprudence. Ignorant or insidious construction can shatter, desecrate and overthrow the vital essentials of government. *Cujus est instituere ejus est abrogare.* Harmony and consistency depend upon construction. *Concordare leges legibus est optimus interpretandi modus.* Harrow; ILLINOIS.

Construction cannot be separated from the fundamental maxims. See *In jure.* It emanates from the prescriptive constitution. *In præsentia majoris cessat potentia minoris.* The great, the dominating ideas must be sought and reasoned from. *Melius petere fontes quam sectari rivulos,* Vol. IV. Where the philosophy of the law is lost the law is lost. *See* JURISDICTION; JEOFAIL; Harrow; ILLINOIS. The fundamental maxims of procedure safeguard and light the way. *See* CODES; *Ignorantia; In præsentia majoris;* INDICTMENTS. Fundamentals of the law are annexed by construction. Church; Galbraith; *Ignorantia;* Evans v. Johnson; Trist: 214: cases, Vol. III.

Ad ea quæ frequentius; Ambigua; AMBULATORY; Atlantic (every presumption against the pleader); Barbier (police power); Bartemeyer (police power); Beard (constitutional limitations of indebtedness); Beer Co. (police power); *Benedicta expositio;* Brown v. Maryland (commerce—original packages); Brown v. Tharpe (word and clause violated must be pointed out); Buck v. Colbath *(Verba fortius);* Carpenter (judgments must be certain); *Casus omissus;* CERTAINTY; CHRISTIANITY (Galbraith; EQUITABLE EXCEPTIONS; Christy; *In præsentia);* Church (CHRISTIANITY; Galbraith); Clayton (renewal of leases); Codes (10 pages; *Ignorantia; In præsentia); Contemporanea; Cujus est instituere;* Days of Grace; Description; Directory; Dumpor (conditions); *Ejusdem generis;* Ellis v. U. S. (strict construction of penal statute); Evans v. Johnson (fundamentals annex themselves—Galbraith); *Falsa demonstratio;* Fisher v. McGirr *(Casus omissus); Generalia;* General words; *Glossa viperina; Grammatica falsa;* Haddock (fundamentals annex themselves); Hahl *(Omnia præsumuntur rite;* Due Process of Law; Jurisdiction presumed; Harrow); Harrow *(Ignorantia;* Illinois; Judicial Records; Hahn; Presumptions of regularity; *Ut res magis);* Heaton (construction of deeds); Jackson v. Cleveland); *Ignorantia legis neminem excusat* (construction is uniform—Ellis v. U. S.); Illinois (Indiana; Colorado; Ohio, Vol. IV; New York, Vol. IV; Missouri, Vol. IV); Indictments (maxims; Certainty); *Ignorantia* (Conserving principles; Jurisdiction; Jeofail; Codes); Incidents (implications);

In pari materia; In præsentia; Jeofail; Kern (states cannot prescribe rules of construction for federal courts); Kirven (records are irrefragable).

Statutes may be void in part. Gill v. U. S.; Ellis v. U. S. Penal statutes are strictly construed. Ellis v. U. S.

CONSTITUTIONAL LAW. §§ 262-269, Vol. I. The American student is up in the air as to constitutional law and its construction until he arrives at a definite conclusion as to the existence of the prescriptive constitution of England, of which he is supposed to learn from Blackstone. Therein he is expected to learn the indispensable axioms of procedure *(see* CODES; INDICTMENTS; *Ignorantia; In præsentia; In jure),* also of construction. As to this the student must judge on the one hand and then carefully consider the first rule of construction as may be judged from the din and clamor of writing and teaching in America, appearing from what is suggested in *Brown v. Tharpe* (one of the quite "late cases").

If *De non apparentibus,* etc., *Frustra probatur quod probatum non relevat, Verba fortius accipiuntur contra proferentem* and *In jure non remota,* etc., are principles founded in the grounds and rudiments of law (§§ 42-72, Vol. I) then there is disclosed the fact that there are principles of jurisprudence that parliaments cannot abrogate in a constitutionalism; that parliament is *not* omnipotent. It is time to quit insisting that conventions and legislatures can enact invincible laws against fundamental principles, *e. g.,* the grounds and rudiments of law. *See* GOVERNMENT. The fact is that statutes are constantly set aside because opposed to fundamental law, without regard to any specific provisions of constitutions. See *Idem agens;* Keech v. Sandford; Church; *In jure.* Denial of these facts is widely abroad. While this is so the student is led away by the bluster and beating of tom-toms by publishers and their narrow visioned employees. Until these mischiefs are pointed out the law must continue a mystification resting on no more solid foundation than the "late case" exclusively, which is often disregarded in the next one.

Whether courts are the bulwarks of liberty depends on whether they know and vindicate the fundamentals of protection. *See* Harrow; Lange: 159, Vol. III; Pettibone, Vol. IV. The fundamentals of liberty are found in the maxims of the prescriptive constitution; therefore, leading to this and explaining what it is is needed work for the jurisprudent everywhere (§§ 104-123, Vol. I, L.C. 219-219*a*, Vol. III).

Absolutism (Constitutionalism; Government; *In præsentia);* Appellate Procedure; *Ad quæstionem; Audi;* Bartemeyer (regulating commerce; sale of intoxicants); Beer Co.; Barbier v. Connolly (Police power of states); Austin (statutes presumed constitutional); Beard (constitutional limitations of indebtedness); Cause of Action (incidents are constitutional); Church (Christianity; Galbraith); *In jure;* Prescriptive Constitution *(In præsentia majoris);* Certainty; Codes; Collateral Attack *(Ignorantia);* Commerce (Gibbons; Beer Co.; Bartemeyer); Conclusions of Law; Constitutional Law (4 pages); *Coram judice;* Courts; *De non apparentibus;* Denver & R. G. R. R. v. Ryan (statutes regulating procedure); Division of State Power (Lane v. Dorman; Burton v. U. S.; *In præsentia);* Dority *(Ubi jus;* Galbraith; Harrow); Due Administration of Justice; Due Process of Law (defined, L.C. 219, 219*a*, Vol. III); Howard v. Fleming; Howard v. Kentucky (usurpation of power is not opposed to due process of law); Crain v. U. S. (record essential. *Debile);* Eminent Domain; Equal and Uniform Law; Equal protection under the law (Strauder, Vol. IV); *Ex post facto* law (Graham v. Folsom); Federal power (Gibbons v. Ogden; Constitutional law); Fertilizing Co. (police power); Flag (prohibition of advertising by); Fletcher v. Peck (impairing obligations; immunity of legislative power); Goodrich v. Mitchell (class legislation); Fundamental law (Galbraith; Legislative limitations; Hanson; *In præsentia majoris;* Prescriptive Constitution, Vol. IV); Hanson v. Krehbiel (legislatures cannot authorize torts; *In jure.* Nor interfere with property rights).

Judgments *(Audi; De non; Frustra; Ignorantia; In præsentia);* Jurisdiction (Conserving Principles; Judgments); Law of the Land (Due Process of Law; Prescriptive Constitution, Vol. IV); Legislative Authority—Limitations (Absolutism—Constitutionalism—Jurisdiction; *Ignorantia; In præsentia;* Judgments—Prescriptive Constitution, Vol. IV); Police Power (Beer Co.; Barbier; Bartemeyer; Flag; *In præsentia);* Procedure—relation to government (Gov-

ernment; Harrow; Appellate Procedure; *In præsentia;* Constitutional Law; Codes; Construction; *Ignorantia;* Mandatory Record, Vol. IV); Property protected (Harrow).

REAL ESTATE. Appurtenances (Fixtures; *Aqua currit;* Chasemore; *Accessorium;* Incidents; Campbell v. Race; Accretion).

Adverse possession (Agar v. Fairfax—partition; Aslin v. Parkin—ejectment; Bell v. Twilight—notice of rights from possession; Bright v. Boyd—occupant's right to his improvements; Campbell v. Race—ways of necessity; *Catala*); Cloud on Title (Crew v. King—entire estates; Crosby v. Wadsworth—emblements; Statute of Frauds); Confusion and Accession (Bright; Jewett; *Cujus est solum*).

. Deeds. *See* CONTRACTS—Hibblewhite; Christmas; Cooch; Elwell; Jackson v. Cleveland; Heaton v. Hodges; Gibson v. Warden; Angle; *Domus sua cuique est tutissimum refugium;* Dumpor's Case (conditions, how construed); Dyer (implied trusts).

Easements (Campbell v. Race; Humphries); Ejectment (Elwes v. Mawe —fixtures; equitable conversion); Fixtures (Elwes); Garth (waste); Goddard (Aerolites; *Caveat emptor);* Horn v. Baker (fixtures); Homestead; Harvey v. Brydges (right of owner to dispossess occupant by force); Humphries (subjacent support); Indemaur v. Dames (dangerous premises; nuisance; who liable for); Landlord and Tenant. One is premumed to intend the natural, direct and probable consequences of his act. *In jure; Sic utere.*

Title to property cannot be transferred against the owner's consent. *Id quod nostrum;* Gill v. U. S.; *Res inter alios.*

CORPORATIONS. Kinds of; how viewed; rights, duties and powers of. Hill v. Boston: cases. *Ultra vires* (Hitchcock v. Galveston; Kirven); Foreign, contracts of (Kirven); Liable like individuals (Kirven; Craker; Brown v. C., M. & St. P. R. R.; Merchants' Bk. v. State Bk., Vol. IV).

Corporate existence, how alleged; Directors of; Power of agents to contract with (Keech; *Idem agens);* Municipal, *cannot be garnisheed* (Divine); Liable for contempt (Franklin Lodge).

MAXIMS. Are the unwritten constitution. §§ 104-123, Vol. I. *Idem agens; In jure; Fiunt enim;* CONSTRUCTION; Windsor: 1; Murray: 219; Taylor: 219*a*, Vol. III.

Accessorium non ducit sed sequitur principale; Acta exteriora indicant interiora secreta; Actio personalis moritur cum persona; Actus curiæ neminem gravabit; Actus Dei neminem facit injuriam (Bostwick; Brown v. Kendall); *A communi observantia non est recedendum* (Abatement); *Actio non datur* (*Quis quid;* Abatement; Cause of Action); *Actore non probante reus absolvitur; Actori incumbent* (*Actore; Semper*); *Actus non facit reum nisi mens sit rea* (Ellis v. U. S.); *Ad quæstionem facti; Aequitas est correctio legis generaliter latæ qua parte deficit; Allegans contraria non est audiendus; Ambiguum placitum interpretari* (conclusions of law); *Assignatus utitur jure auctoris; Audi alteram partem.*

Benedicta est expositio quando res redimitur a destructione (Illinois); *Benigne faciendæ sunt interpretationes chartarum; Boni judicis est ampliare.*

Caveat emptor; Certum est quod certum reddi potest; Cessante ratione legis cessat ipsa lex; Communis error facit jus; Concordare leges; Consensus tollit errorem (Gill v. U. S.); *Contemporanea;* Courts are bound by their records (Abatement; *De non; Frustra;* Conserving Principles); *Cujus est solum; Cujus est instituere ejus est abrogare* (Harrow; Ellis v. U. S.).

Debile (Windsor; Munday; Sache); *De minimis* (Abatement); *De non apparentibus et non existentibus eadem est ratio; Dies dominicus; Domus sua.*

Equity attaching for one purpose attaches for all; *Ex causa turpi; Ex dolo malo; Executio juris; Ex facto oritur jus; Ex nudo pacto; Expressio eorum; Expressio unius; Ex uno disces omnes; Fabula non judicium; Falsa demonstratio; Falsus; Favorabiliores; Fiunt enim de his contractibus scripturæ, ut, quod actum est, per eas facilius probari poterit.* *See* ORAL EVIDENCE, Vol. IV; § 53, Vol. I. *Frustra probatur; Generalia specialibus non derogant; Glossa; Viperina.* He who comes into equity must come with clean hands (*In pari*).

Idem agens et patiens esse non potest (Keech); *Ignorantia* (Hunt; Lansdown; Gordon); *In æquali; In jure; In pari; In præsentia; Interest reipublicæ; Id quod nostrum* (assent—two cannot contract and bind a third. *Res inter alios*); *Ita lex scripta est* (Government; Construction; Ellis v. U. S.); *Juris præcepta; Jurisdictio est potestas; Lex neminem cogit ad vana* (Absurdities); *Lex non exacte* (Church; Ellis v. U. S.; Galbraith; Absurdities; Government); *Malum non præsumitur* (Fraud); *Melius (In præsentia); Modus et conventio vincunt legem* (*Consensus*); *Multitudo imperitorum perdit curiam* (*Amicus curiæ*).

Necessitas inducit privilegium quoad jura privata (Certainty; Campbell v. Race); *Nemo dat qui non habet* (Bentley—*Id quod nostrum*); *Nemo debet bis vexari* (Former Jeopardy; Burton v. U. S.); *Nemo debet esse judex in propria sua causa (Idem agens;* Keech); *Nemo præsumitur malus* (Fraud); *Nemo tenetur* (Hale v. Henkel; Fries); *Nihil possumus contra veritatem (Falsus); Nihil tam conveniens* (Hibblewhite; Angle; Authority); *Non hæc in fœdera veni* (Assent; Contract); *Noscitur a sociis* (Construction); *Nova constitutio (Ex post facto); Nullum tempus occurrit regi* (Government); *Nullus commodum* (*In pari;* Bull).

Omne majus continet in se minus; Omnia præsumuntur rite (Harrow; Hahn); One is presumed to intend the natural, direct and probable consequences of his act *(In jure); Præsentia corporis (Falsa; Res ipsa loquitur); Præsumatur pro justitia sententiæ (De non; Omnia præsumuntur rite;* Harrow); *Probatis extremis præsumuntur media (Ex uno disces omnes;* Evidence; *Omnia præsumuntur rite;* Harrow).

Quando jus domini (Government); *Quicquid plantatur solo solo cedit* (Elwes; Fixtures); *Quilibet potest renunciare (Consensus); Qui primum peccat ille facit rixam (In jure;* C. v. Selfridge); *Quis, quid, coram quo, quo jure petatur* (Abatement; *Actio non datur; Actor qui contra; Actore;* Cause of Action); *Quod ab initio non valet* (Conclusions of Law; Cause of Action; *Debile); Quod lex non vetat permittit* (Cause of Action; Demurrer; Indictments; Jurisdiction).

Regula pro lege (Construction; Government); *Res judicata facit ex albo nigrum* (Kirven; *Interest reipublicæ); Rex non potest peccare* (Government; *In præsentia); Res est misera ubi jus est vagum et incertum* (Construction; Harrow; Illinois); *Res inter alios acta alteri nocere non debet (Id quod nostrum;* Assent); *Res ipsa loquitur (Præsentia corporis;* Evidence; Ellis v. U. S.; L.C. 211, Vol. III; Montgomery v. S., Vol. IV).

Salus populi suprema lex (Interest reipublicæ; Harvey v. Brydges; Forcible Trespass; Evidence); *Semper præsumitur pro negante (Actore;* Burden of Proof); *Sic utere tuo ut alienum non lædas (In jure;* Fletcher v. Rylands; Heaven v. Pender); *Simplex commendatio (Caveat emptor;* Deceit; Fraud; L.C. 374-384, Vol. III).

Ubi eadem (Abatement); *Utile* (Abatement); *Ut res magis valeat quam pereat* (Construction; Harrow v. Grogan; *Benigne faciendæ; Verba fortius); Verba fortius accipiuntur contra proferentem* (Construction; Evidence; Cause of Action; Codes; Appellate Procedure; *Favorabiliores;* Indictments; *Ignorantia; In præsentia;* Conserving Principles; Harvey v. Brydges; Harrow v. Grogan; Illinois; Every); *Verba intentione debent inservire* (Construction; Intent; Absurdities); *Volenti non fit injuria* (Hegarty; *Consensus*).

What ought to be of record must be proved by record and by the right record (Appellate Procedure; Construction; Conserving Principles; Certainty; Evidence; *Expressio unius;* Codes; Crain v. U. S.; Harrow v. Grogan; *In præsentia;* §§ 104-123, Vol. I; L.C. 1-20: cases; also L.C. 65-90, Vol. III; Sache, Vol. IV); Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer *(Bona fide* purchaser; *In jure;* Equity).

MISCELLANEOUS. Animals; Bacon; Bloom v. Richards *(Dies dominicus);* Bostwick (Accident); Case System; Chasemore v. Richards *(Aqua currit);* Civil Death; Civil Law; Civil Rights; Common Law; Drew v. Davis—Freeman v. Kenney (taxation—assessments); Drunkards; Entirety of the Law; Colorado; California; Florida; Indiana; Illinois; First Lessons; Finding the Law (case system—Appellate Procedure); Garth v. Cotton (waste);

Copyright—Patent-right (Gill v. U. S.); Hagthorp (administration is a necessity. *See* ADMINISTRATION); Harding v. Glyn (Precatory Trusts); Husband and Wife; Infants; Impossibility; Law of the Road; Law of the Case; Leading Cases; Literature of the Law (observations relating to. *See* APPELLATE PROCEDURE).

Tables of cases cited. Value of (Appellate Procedure).

Title to property cannot be divested against the owner's consent. *Id quod nostrum;* Bentley.

The content of this volume is led to from maxims, titles of cases and usual index topic heads. To illustrate, if the subject of "CONSIDERATION" is desired, that topic is turned to, and thereunder will be found the maxim, *Ex nudo*, etc., and the cases illustrating the application of the maxim; or the discussions may be reached from the maxim or from the cases. Under the title "NOTICE" one is led to *Audi alteram partem*, also *Pennoyer:* 58, and *Windsor:* 1. To illustrate further, under *Ex nudo*, etc., will be found *Cumber v. Wane*, Leading Case Number 311. This case is led to in an abbreviated way, thus: *Cumber:* 311. Compactness is a leading end; for this an abbreviated plan must be adopted. This is fully explained in the FOREWORD to the author's work, "DATUM POSTS OF JURISPRUDENCE." Thus is shown how the leading cases can be led to by the space-saving plan indicated, which is necessary for the condensed-intensive performance.

On pages 585-850 are found the Leading Cases. These are led to by reference from the abbreviations "L.C." (Leading Case); also by the title of the case followed by a colon and the number of the case. The reader should familiarize himself with the Leading Cases (Volume III) and the arguments they support, and the uses made of them throughout this work.

Therefore the significance of "L.C." and what it leads to must be well understood. The necessary understanding will come from a perception of the matter in Volume III, and how this is cited and incorporated throughout the work to support all parts thereof.

C. stands for Commonwealth; *cf.* for *confrare* (compare); P. for People; *q.v.* for *quod vide* (which see); R. R. for Railroad Company; R. for *Rex* (King) or *Regina* (Queen); S. P. for Same Point; S. for State; U. S. for United States.

GROUNDS AND RUDIMENTS OF LAW

TEXT-INDEX

ABANDONMENT: Of error. *See* WAIVER; APPELLATE PROCEDURE; ASSIGNMENT OF ERROR; Brewer: 296; Atlantic; *Consensus*, etc.
Of the statutory record by failing properly to assign or argue error. *See* ASSIGNMENT OF ERROR; Bray; § 53 (CONVENIENCE), Gr. & Rud.; APPELLATE PROCEDURE; L.C. 290*a*-299.
Of title to property. Wyman, 40 Am. Dec. 461-469, n. Of mining claim. *See* Boggs; MINING. Of contract; effect. Cutter: 308; Frost: 308*a*. Of copyright; patent-right. Gill v. U. S. Of infant. *See* INFANTS.
Generally: Hughes' Proc. 401; 1 Cyc. 3-8.

ABATEMENT. What is matter of abatement and what is essential matter is a question of the greatest significance to the practitioner; it is likewise in other relations, as will be suggested. For a condensed view it may be said that abatement matter is dilatory matter, which is a correlative of essential or non-waivable matter. *See* Hughes' Proc., pp. 401-408.

Juridical matter may be viewed as either dilatory or essential matter. All that judicial records present for consideration is either one or the other. Judgment as to this involves the greatest professional acumen, which comes from highly technical preparation and long experience. Atlantic. It involves nothing less than a sound knowledge of the two juridical records, namely, the mandatory and the statutory records; of what the *coram judice* proceeding depends on for all its uses.

The introduction of these matters is ever attended with three basic rules and their cognates. These rules are:

1. *What ought to be of record must be proved by record and by the right record.*

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2. *Every presumption is against a pleader.*

3. *A court is bound by its record.*

These rules are respectively parts of great maxims, namely, *Expressio unius est exclusio alterius, Verba fortius accipiuntur contra proferentem* and *Salus populi suprema lex.* Around these rules nestle these conceptions, What is not juridically presented cannot be judicially considered (*De non apparentibus et non existentibus eadem est ratio*). The mandatory requirements of a constitutionalism cannot be waived. Campbell v. Greer: 2*a*; Atlantic.

A right conception of dilatory matter is attended with considerations of what can be waived and what cannot be waived, which brings with it the discussions of *Consensus tollit errorem* (the acquiescence of a party in error obviates its effect). Waiver brings with it a knowledge of what can be waived and what can not be waived. With this are the discussions of what is a nullity and what a mere irregularity. Generally, disregard for abatement or dilatory matters involves nothing more than an irregularity. Deitsch v. Wiggins.

The matter that may be classed as dilatory or formal matter may be waived; it is formal or ceremonial, *e. g.*, the words of the law may prescribe that a *summons issue* and be *served* and *returned* and be *filed* by the clerk and made a part of the record which shall evince this *jurisdictional fact.* Nevertheless a party may appear

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and thus confer upon the court jurisdiction of his person in a criminal case, where an arrest under a warrant is *further commanded*. It is due to observe that all this ceremony commanded by statute, code or practice act is dispensed with by general appearance. After this all relating to service of process or arrest is waived (*Quinn v. P.*, Ill.). Errors in relation thereto may be condoned (see *Harkness v. Hyde*, U. S.). Construction of laws has to do with what is mandatory and what is directory. The former relates to non-waivable matter and the latter waivable, *e. g.*, codes provide that the statement shall contain facts sufficient to constitute a cause of action in ordinary and concise language, without unnecessary repetition. Now, the requirement for essential facts can never be waived, but otherwise as to verbiage and prolixity. Objections to these may be waived; such are abatement or dilatory objections. § 56, Gr. & Rud.; Kraner: 299. These are disposed of by an application of the maxim *Consensus tollit errorem*. The requirement for essential facts is mandatory. It involves the three rules first introduced. These rules should be considered in reference to requirements of appellate procedure, to resist objections upon collateral attack, for *res adjudicata*, the division of state power, due process of law, the comity of courts, constructive notice and other conserving principles of procedure. §§ 83-104, Gr. & Rud. To illustrate, suppose it is sought to prove an estoppel or a title to property founded on a judgment. Here the question is, for such proofs, which is the *right* record? Having determined this, then a further question is, how much of the *right* record is essential and how much of it is surplusage. There may be surplusage in the *right* record, *e. g.*, suppose there was a general appearance after all the ceremonial steps and proceedings to serve with process or to get an appearance; after this appears in the right record, some matter, at one stage important, is afterward rendered surplusage, and should be so construed in all further uses of the record for the conserving principles, and to

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evince the estoppel and the title above presupposed. Surplusage is useless matter and should be omitted from all juridical presentations and considerations. It is vain and fruitless; it may constitute the prolixity forbidden by a rule of the common law and reaffirmed by codes and practice acts. It seems well to observe that objections to this rule must be apt, precise, certain and formal. These are dilatory, and such objections and matter are waived unless rightly objected, excepted to and so presented. He who stands on the forms of the law must himself be precisely correct and most certain and positive (*Kraner:* 299). The forms of the law are a part of the law, but only for him who knows what the exact form should be. Accordingly the rule is, that abatement pleas are technical, learned and refined. Under all systems they are the same; they are dangerous to their pleader. Every presumption is against him from beginning to end, for a fundamental principle is, *that it is the policy to speed a cause to its final disposition upon its merits and not to defeat or delay it by over-regard for technical or formal objections.* These are disfavored, hence a waiver of them is sought and strictly applied by courts (*Roberts v. Moon* (1794), 5 T. R. 487). This rationale affects statutes, as is shown by hundreds of decisions under all systems. In all the policy is the same. *Ubi eadem ratio ibi idem jus.* The same fixed stars of reason guide through all systems. *See* CODES.

There are many matters in procedure that vitally affect government and its operations. Discussions relating to due process of law show this. Requirements for this cannot be waived nor dispensed with. They must exist and appear from the right record, which record itself is of high concern. No constitutionalism can carry on its operations without a record. Therefore, the first rule above mentioned may be called the *constitutional* rule. Since there must be a record, it must be established and it must speak with certainty. Wherever abatement or dilatory matter is involved strict rules of certainty attach, as already observed, and espe-

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cially where a review of abatement or waivable matter is sought in an appellate court. Here every presumption is against the pleader, the appellant. To present that matter he must rely upon the statutory record (the bill of exceptions). The matter must be rightfully presented, objections and exceptions of precision and certainty must appear, and, if the prescribed practice, be again renewed in the motion for new trial, with proper exceptions relating thereto, and finally like certainty as to assigning error, and in arguing the errors assigned. Procedure involving abatement or waivable matter requires certainty and technical knowledge. It must be studied from the fundamental rules above mentioned. These lie at the base of procedure of which dilatory matter is only a branch.

Time and order of presenting abatement matter must be well understood by the practitioner.

Next is a table, widely found, showing the order in which pleas in abatement must be pleaded and presented; it should be well considered:

1. To the jurisdiction of the court.
2. To the disability of the person
   (a) Of the plaintiff, and
   (b) Of the defendant.
3. To the count or declaration.
4. To the writ, namely:
   (a) To the form of it.
   (b) To the action of it.
5. To the action itself, in bar thereof.

Generally: See Hughes' Proc.

Abatement pleas cannot be presented piecemeal. L.C. 151.

Motion to make more specific must be prompt. By moving to strike out bill of exceptions, other objections not then raised are waived. When objections are specific, all else is waived that is not specified.

The above involves very technical rules that should be well understood by the practitioner in both civil and criminal cases.

What is once waived is gone forever. It cannot be recalled. Waiver is favored. This is a conserving principle of procedure. *Interest reipublicæ.* Atlantic.

One must practice law on his own knowledge and not that of the adverse side and of the court. Kraner: 299.

Concluding observations. 2 Gr. Ev. 18-27; Bouv. Dic. What is abatement or dilatory matter on the one hand and matter of substance or mandatory matter on the other is a question of great complexity. It presents many phases and generally what can and what can not be waived. A fundamental command of codes introduces it thus: *"The statement (complaint or petition) shall state facts sufficient to constitute a cause of action in ordinary and concise language and without unnecessary repetition."* It may be observed that the cause of action must appear to give the court jurisdiction. Campbell v. Greer: 2*a*; Campbell v. Porter: 2. Courts are created to entertain causes of action, not anything else or less. Until it is presented there is nothing for the court to act upon, and then its proceedings are subject to collateral attack. But if it is not set forth concisely in ordinary language this is not attended with such far-reaching consequences. These faults may be waived, and they are waived unless aptly objected to. *Consensus tollit errorem; see* PROLIXITY.

It is also well to note that a part of that provision is mandatory and a part is directory. These distinctions are leading questions in statutory construction.

Statutory commands are sometimes mandatory or imperative and sometimes directory. In the above code provision is an instructive illustration.

Mandatory requirements are a limit of liberal construction, of presumptions of regularity and of waiver. This limitation constantly attends discussions of abatement or dilatory matter. See *De minimis non curat lex.*

The forms of the law are a part of the law, and these will be enforced if properly presented and insisted upon. However, it is the policy of the law to ignore them, and to make disposition of causes upon their merits. Such is a conserving principle of procedure, *e. g.*, the statute prescribes the ceremony of summons to service and return; but all of this may be waived.

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(Quinn v. P.) Directory matters may be waived or disregarded. *See* ABATEMENT AND REVIVAL, 1 Cyc. 10-137.

Judgments on pleas of abatement. L.C. 150; Hughes' Proc., p. 407.

Matters of abatement, how presented. §§ 63, 235, 239, 278, Gr. & Rud. *See* STATUTORY RECORD; ERROR.

Dilatory matters may be waived. § 56, Gr. & Rud. Kraner: 299; L.C. 290*a*-299.

In contracts. A reduction made by the creditor, for the prompt payment of a debt by the debtor. This involves the law of accord and satisfaction, which is extendedly discussed in the widely cited case of *Cumber v. Wane* (all of an overdue liquidated debt cannot be discharged by paying a part). This case is widely cited in contract works.

Of rent. Where premises are destroyed during the term, there is much diversity of view as to whether or not the liability to pay rent abates. The cases cited in the note will introduce the discussion, which is very extended. Hallett v. Wylie; Taylor: 310.

In torts and trespass. The right to abate a nuisance is a question of remedial right—of procedure. Rose v. Miles.

In crimes. Crimes may be enjoined.

Of legacies. Where the estate is inadequate to pay debts and carry out all bequests, those of legacies will be diminished or entirely abated as necessities therefor may develop.

Of taxes and revenue demands. The right to relief from excessive and unjust tax claims is statutory—a local question. *See* TAXATION.

ABBREVIATIONS: Figures; when permissible in pleading. Berrian v. S., 2 Zabr. (N. J.) 679, 2 L. C. C. (B. & H.) 107-118, n. (Arabic figures cannot be used); but the modern rule denies, Berrian. 1 Bish. Cr. Proc. 344, Whart. Cr. Pl. & Pr. 276. Dates, sums and numbers shall be expressed in figures and not in words. § 4, Or. XIX, Eng. Jud. Act. Prolixity is to be avoided. Sturges: 111.

Tables of abbreviations of law works and terms. Bouv. Dic. 9-50, Lawyers' Reference Manual, Mews, E. C. L., and other general digests.

ABDUCTION: R. v. Prince is one of the most instructive cases upon the point that intent is immaterial in statutory crime. It is an exception to *Actus non facit reum nisi mens sit rea.* It greatly affects pleading and proof. Generally: Bouv. Dic., 2 McClain, Cr. L., 1100-1108; 1 Cyc. 141-163.

ABEL: (Sureties; relief of); L. C. 334.

AB INITIO: Trespasser; officer is, who fails to return his process. Six Carpenters' Case. Or who abuses process. Malcolm; Barrett; Dunlap; L.C. 164, 170. Or to make a record.

Ab Initio.—

ABLEMAN v. BOOTH (1858), 21 How. 506-526, 16 L. Ed. 169. Stated in Tarble's Case, McClain's Const. Cas., Tucker, Const., Brown, Jurisdic. All process is domestic. Ableman.

Polity of the federal government; relating to the latter this case should be considered with Cohens, McCulloch and Tarble's Case. *In præsentia majoris.* Blake.

The student of the polity of the federal and state governments should study the above cases. *See* CONSTITUTIONAL LAW.

ABORTION: Abrams v. Foshee, 3 Iowa, 274, 66 Am. Dec. 77, n., 2 McClain, C. L. 146-152, Bouv. Dic., And. Dic., 1 Cyc. 170-196.

ABSOLUTISM: Ways of. §§ 60, 115, 123, 163, 311 Gr. & Rud.

ABSTRACTS OF RECORD: In appellate procedure, essentials of. Gibler; Hand; Vandeventer v. Goss (Mo.); Butler Co., 152 Mo. 441; § 53, Gr. & Rud. *See* APPELLATE PROCEDURE; BILLS OF EXCEPTIONS. Plea to be passed upon in review must be set out in the abstract. Chamberlin, 169 Ill. 34 (conclusions insufficient).

ABSTRACTS OF TITLE: Warvelle on; 1 Cyc. 213-216.

ABSURDITIES: Are to be excluded. Suth. Stat. 218, 238, 246, 258, 259, 323, 324, 410, 421, Smith, Stat. 516-519, End. Stat. 182, Bro. Max. 542, 574, 575, 580, 582, 620, 684, 190 U. S. 212: cases, L.C. 223, 224: cases, 93 U. S. 461; § 3 Proc.

Absurdity and incongruity to be excluded. Adams v. N. Y.; Bro. Max. 684. *Verba nihil operari,* etc.: *Verba offendi,* etc.: *Uno absurdo dato, infinita sequuntur; Actus repugnus,* etc.; *Lex Angliæ non patitur absurdum. Ad ea quæ frequentius,* etc.: *Law is the perfection of reason, and therefore absurd things—nonsense—are excluded.* Common sense is followed. Suth. Stat. 259.

Rational procedure excludes absurd, vain, and fruitless things. Huntsman: 231. §§ 13, 236, Hughes' Proc.

Lex neminem cogit ad vana, etc. A thing shown to be absurd, or vain and fruitless, should be disregarded. This is a general rule of construction and equally applicable to all compacts.

No text imposing obligation is understood to demand impossible things. Lieb. Herm. 136, 2 Whart. Conts. 641, Suth. Dam. 655, 709, 710.

A penal statute will be liberally construed to defeat or avoid an absurdity. Nelson v. S., 111 Wis. 394, 87 Am. St. 881 (strict construction must permit sensible construction). Eddy, Combinations, 62-70.

Maledicto, etc. 1 Bl. Comm. 61, 1 Kent, 462. *Verba intentione debent inservire; Lex non exacte,* etc. Church v. U. S.

It will not be presumed that a court gave judgment in the absence of substantial matter if this can be aided by fair and liberal construction. This is aider by verdict. 1 Gr. Ev. 19; Bro. Max. 182, 602. Dobson v. Campbell, *sub Dovaston. Interest reipublicæ.*

ABUSE OF POWER: See USURPATION.

ABUTTING PROPERTY OWNERS: Story v. R. R.

ACCEPTANCE: Of offers; doctrine, rules. L.C. 334. 2 Mech. Sales, 1363-1401; Bouv. Dic.; And. Dic.; Ans. Conts. 4, 12-16, 19, 22, 24, 33; Whart. 1-28; 1 Beach, 35-71; §§ 43-50, Hughes' Conts. Of deeds. L.C. 388. Essential for a contract. L.C. 321. By letter. L. C. 326.

See Bouv. Dic., And. Dic., Cook, Corp.

Of commercial paper. Zane on Banks and Banking. *See* COMMERCIAL PAPER. 7 Cyc. 757-782. Of conditions in tickets. Pa. R. R. v. Loftis; Cherry.

Of a building and payment no bar to action for damages from imperfect construction discovered eight months afterward. Ludlow, 119 Ky. 251, 115 Am. St. 254-264, n.

ACCESSION: Bouv. Dic.; And. Dic. 1 Cyc. 222-226. *See* CONFUSION AND ACCESSION; ACCRETION.

ACCESSORIUM NON DUCIT, SED SEQUITUR suum principale: The incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Bro. Max. 491-498; M'Culloch: 147. *See* INCIDENTS; IMPLICATIONS; 41 Me. 177, 66 Am. Dec. 219-246, ext. n. § 204, Hughes' Proc. 1 Cyc. 226. *Accessorium non trahit principale:* An accessory does not lead to a principal. Bro. Max. 496. *Accessorius sequitur naturam sui principalis:* An accessory follows the nature of the principal. Bro. Max. 497.

ACCESSORY: I McClain, Crim. Law, 204-210, q. v.; 3 Gr. Ev. 40-50, 2 Bish. Cr. Proc. 1-15; Bouv. Dic., And. Dic. Evidence of. U. S. v. Gooding: 201.

ACCIDENTS: *Actus Dei nemini facit injuriam:* The act of God is so treated by the law as to affect no one injuriously. Bro. Max. 229-242, 15 Wall. 538, Suth. Dam. 37, 476, 655, 709, Bouv. Dic., *see* ACT OF GOD; And. Dic.; §§ 69, 293, Gr. & Rud.; § 70, Hughes' Conts.

What is an accident. Davis v. Saunders (1770), 2 Chit. 639 (18 E. C. L. R.), 1 Rul. Cas. 203-369, n., 10 Mews' E. C. L., Cool. Torts, 91, 93, 751, 799, 808, 1 Cyc. 758-760.

When a defense to a contract. L.C. 308-310; Hallett; Hughes' Conts., § 70.

Parties may contract against. Paradine; 64 N. J. Law, 240; 81 Am. St. 473-475; cases; L.C. 309, 310; Suth. Dam. 476, 365, 709; 1 Beach, 216-231; Hughes' Conts., § 4.

Destruction of leased premises; when tenant must pay for. Polack; Hallett. Destruction of thing preventing performance, whose loss. Hallett: 308*d*; Dame v. Wood: 308*c*. *See* ABATEMENT.

Fortuitous event. 1 Suth. Dam. 37; Bouv. Dic.; ACT OF GOD. Brown v. Kendall; Nitroglycerine Case.

Equity jurisdiction in accident cases. 1 Beach, Eq. 25-34; 1 Sto. Eq. 75-106; 9 Am. Law Reg. 449.

When a defense for crime. 1 McClain, C. L., 285, 300.

ACCIPERE QUID UT JUSTITIAM FACIAS, non est tam accipere quam extorquere: To accept anything as a reward for doing justice, is rather extorting than accepting. Lofft, 72. American Steamship Co. v. Young.

ACCORD AND SATISFACTION: See Cumber, L.C. 311; cases; 100 Am. St. 386-456; 1 Cyc. 305-350.

Generally: 1 Suth. Dam.; Bouv.; And.; Dic. PAYMENT, 1 Rul. Cas. 364-405; 2 Chit. Conts. 1101, 1122-1133; Ans. 85, 315; Bish. 54; Hughes, §§ 123, 124; 1 Add. 377-387; 1 Beach, 422-456; 2 Gr. Ev. 28-33; 2 Kent, 389; Cumber.

ACCOUNT STATED: 2 Gr. Ev. 34-39; Lockwood v. Thorne (1854), 11 N. Y. 170, 62 Am. Dec. 81-94, ext. n. *See* S. C., 18 N. Y. 285, 2 Wh. Ev. 1133-1140, 2 Chit. Conts. 961-970, 2 Whart. 770-780, 2 Gr. Ev. 126, 127; Laycock v. Pickles (1863), 4 B. & S. 497 (115 E. C. L. R.), 1 Rul. Cas. 425-432, n.; Van Bebber, 26 Oreg. 562, 27 L. R. A. 811-827, ext. n. (what constitutes); Comer, 107 Ala. 300, 54 Am. St. 93, n., And. Dic.; Bro. Max. 257.

Defined. An account stated is an admission by one party who is in account with another that there is a balance due from him. The admission that a balance is due imports a promise to pay upon request, which may be sued upon as though it created a liability *ex contractu.* Ans. Conts. 365, Leake, 119, 1 Cyc. 362-503.

ACCRETION: See *Res accessorium,* etc.; *Quicquid plantatur solo, solo cedit;* FIXTURES; And. Dic.: cases; Bouv. Dic.: cases. *Aerolites;* whom they belong to. Goddard v. Winchell, 1 Warv. Vend. 8. Law of as to shore lands. De Lassus v. Faherty (1901), 164 Mo. 361, 58 L. R. A. 193-213, ext. n.

ACKNOWLEDGMENTS OF DEEDS: Jordan v. Corey (1850), 2 Ind. 385, 52 Am. Dec. 516-525, n., And. Dic., Bouv., 1 Cyc. 506-629. Conclusiveness of. American, etc., Co. v. Thornton (1895), 108 Ala. 258, 54 Am. St. 148-159, ext. n. *See* CERTIFICATE.

ACKROYD v. SMITHSON. *See* EQUITABLE CONVERSION. 4 Mews' E. C. L.

A COMMUNI OBSERVANTIA NON EST recedendum: There should be no departure from common observance or usage. *Stare decisis.* "The forms of the law are a part of the law" is a useful rule of procedure. See *Actor qui contra regulam,* etc. Ancient forms of expression in pleadings are commended. Steph. Pl. 384-389; Phillips' Code Pl. 135, 136, 196 Mo. 382. Public records, and whatever imports constructive notice, should be regulated by established forms and general rules.

ACQUIESCENCE: See *Allegans; Acta exteriora,* etc.; ABANDONMENT; RATIFICATION. L.C. 320.

In error; its effect. §§ 46, 65, Gr. & Rud. *Consensus,* etc., 168-178, Hughes' Proc.

Of injured party defeats recovery. *Volenti,* etc. Phillips, Code Pl. 4, 433, 453. Fighting by agreement does not. Phillips, Code Pl. 4, 33, 433. *Volenti.*

ACRAMAN v. MORRICE: L.C. 406.

ACTA EXTERIORA INDICANT INTERIORA secreta: Acts indicate the intention, or, external acts indicate undisclosed thoughts. Bro. Max. 301; *Res ipsa loquitur;* Kearney: 211; Six Carpenters': 165; "Squib Case." Malice is inferred from the use of a deadly weapon. L.C. 196-198. From acts and conduct may presumptions arise. Moller. *See* ACT AND OPERATION OF LAW; ACQUIESCENCE; L.C. 180; PRACTICAL CONSTRUCTION; *Contemporanea expositio,* etc.

Intent presumed. 1 McClain, C. L. 123. Allegation and proof of. *Id.,* § 124; L.C. 232.

ACT AND OPERATION OF LAW: Presumptions from. § 288, Gr. & Rud. *See* L.C. 341. *Acta exteriora,* etc.

ACTIO NON DATUR NON DAMNIFICATO: An action is not given to one who is not injured. Ashby: 273. §§ 79, 224, Gr. & Rud.

A wronged party essential. Hughes' Proc. L.C. 94; *Alterius circumventio*, etc.; *Fabula non judicium; Quis, quid, a coram.*

ACTIO NON FACIT REUM, NISI MENS sit rea: An action does not make one guilty unless the intention be bad. *Actus non facit reum*, etc.

ACTIONS AND REMEDIES. See Ashby; *Ubi jus;* REMEDIES. Concurrent remedies. Colby, 68 N. H. 176, 73 Am. St. 557-568, ext. n. See ELECTION OF REMEDIES; L.C. 156, 240.

ACTIONS ON CONTRACTS: Cutter v. Powell: 308; 2 Beach, Conts. 1676-1779.

ACTIO PERSONALIS MORITUR CUM persona: A personal right of action dies with the person. Bro. Max. 903-916; 2 Kinkead, Torts, 465; 1 Cyc. 757; Hughes' Proc.; § 295, Gr. & Rud. L.C. *Baker v. Bolton* (1808), Camp., 493, 2 Sm. Cas. Torts, 572; Shear & Redf. Neg. 290, 2 Kent, 416, Busw. Pers. Inj. 15, 91 Tex. 310-312, 7 *id.* 1276 (husband and wife); *Hambly v. Trott* (1776), 1 Cowp. 371, 2 Rul. Cas. 1-17, 3 L. R. A. 213; Zabriskie v. Smith (1855), 13 N. Y. 322, 64 Am. Dec. 451-455, 1 Suth. Dam. 6; 9 Ir. Law Times, 281; *Harrisburg (The)* (1886), 119 U. S. 197-214, stating *Baker* and *Carey* (able *resume*).

A husband cannot recover for the killing of his wife. Higgins v. Butcher (1607), Yelv. (Eng.) 89; nor the father for the killing of his child. Edger, 14 S. C. 20, 37 Am. Rep. 714-719, n.; but see Sullivan v. R. R., 1 Cent. L. J. 204, 11 Alb. L. J. 10, 2 Gr. Ev. 225, n.

Death abates a suit which does not survive. Martin v. R. R. (1894), 151 U. S. 673.

Negligence causing death; statutes regulating. Carey v. R. R. (1848), 1 Cush. (Mass.) 475, 48 Am. Dec. 616-641, ext. n.: 4 Suth. Dam. 1259-1280, 2 Kent, 416; Harrisburg (The), *supra;* Smith, Cas. Torts, 573; Shear & Redf. Neg. 290-302; Usher v. R. R. (1889), 126 Pa. 206, 4 L. R. A. 261, n. (Ld. Campbell's Act), 12 Am. St. 863; Louisville R. R. v. McElwain (1896), 98 Ky. 700, 56 Am. St. 385, n. (bars common-law right of action) Hutch. Carr., §§ 777, 778 (*stating Ld. Campbell's Act* and the above maxim). That act construed. Dennis v. R. R., 70 S. C. 254, 106 Am. St. 746.

Measure of damages for the death of a human being. Suth. Dam., Sedgk. Dam. *Measure of damages. Six thousand dollars for killing girl of six years, allowed.* 92 N. Y. 219, Burd. Torts, 59; 84 Cal. 513, 18 Am. St. 248, n. (damages, how computed); Louisville R. R., *supra;* 95 Cal. 510, 17 L. R. A. 71-80, ext. n. *Lex fori controls as to damages.* Greater damages allowed in other states, inconsequential. 126 N. Y. 10; notes 2 R. R. & Corp. Cas. 351, 13 L. R. A. 458. See 78 Ky. 348, 39 Am. Rep. 244-246.

Comity of the forum not extended to actions, when the injury occurred in another state. 154 U. S. 190; 72 Md. 144, 20 Am. St. 461, n., 19 Atl. Rep. 643, 2 R. R. & Corp. Cas. 345-352, n.; Attrill v. Huntington (1889), 70 Md. 191, 14 Am. St. 344, 355, ext. n., 2 L. R. A. 779; Alabama, etc., R. R. v. Carroll (1892), 97 Ala. 126, 38 Am. St. 163, n., 9 L. R. A. 388 (allowed where statutes are the same). *Contra* cases: Van Voorhis v. Brintnall (Conflict of laws); Boston, etc., R. R. v. Hurd (1901), 47 C. C. A. 615, 108 Fed. 116, 56

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L. R. A. 193-223, ext. n.; Whitlow v. Nashville R. R.

Penal statutes not generally enforced outside of state enacting them. Ror. Interstate Law, 206-225; Suth. Dam.; 67 Vt. 76, 48 Am. St. 800, n.; 69 N. H. 540, 76 Am. St. 192. Nor are crimes.

Aliens may sue for death by wrongful act. See ALIENS.

Federal courts will not enforce state penalties; and judgment on will be inquired into to defeat. Wisconsin v. Pelican Ins. Co. (1888), 127 U. S. 265; Cool. Const. Lim. 28.

Penalties subject to repeal at any time before judgment. Suth. Stat. 166; Cool. Const. Lim. 443, 472; 18 Me. 109; Sedgk. Stat. 95-116. Depend upon a penal statute, and these are strictly construed. Suth. Stat. 371, 392, 397, 398.

Effect of statute to defeat or preserve pending civil actions. 87 Ga. 294, 14 L. R. A. 721-725, n.

Death; injuries to the dead; at common law and under statutes; the federal and state decisions, classified. Bish. Torts, 1267-1274.

Release given by one while living, binds his representatives and heirs after his death, although it is caused by actionable torts. 33 S. C. 556, 26 Am. St. 700, n.; *contra:* Donahue v. Drexler (1884), 82 Ky. 157, 56 Am. Rep. 886.

Unborn child: Injuries to, are within the statute. Nelson, 78 Tex. 621, 11 L. R. A. 391, 3 Am. R. R. & Corp. Rep. 653; "George and Richard," 33 L. R. Admr. 466, 480; 1 Suth. Dam., § 8, cas.; Victorian R. R., *contra.* Dietrich, 138 Mass. 14; S.: 1 Suth. Dam. 8 (child born from an injury can not recover for it).

How many distinct causes of action arise from injuries resulting in death. 34 L. R. A. 788-803, ext. n.; Lubrano v. Atlantic Mills (1895), 19 R. I. 129, 34 L. R. A. 797-808, n.

Mere personal torts are not assignable, Comegys v. Vasse (1828), 1 Pet. 193, 7 L. Ed. 108, n.; 2 Lead. Eq. Cas. (Wh. & T.) 1624; Zabriskie, 13 N. Y. 322, 64 Am. Dec. 551-562, ext. n.

The modern rule is that whatever survives to representative is assignable. 1 Suth. Dam. 7; Lee's Adm'r v. Hill (1891), 87 Va. 497, 24 Am. St. 666, n.; Notes to Ryall: 397.

Survival and abatement of actions. The common-law doctrine is extended. Now all torts to property, and generally to person, survive.

Generally whatever is capable of assignment survives. 1 Suth. Dam. 7; 21 Am. Law Reg. (N. S.) 425-435. Survivability of actions. Perkins v. Stein (1893), 94 Ky. 433 (*Verba intentione*, etc.), 20 L. R. A. 861, n.; Warren v. Furstenheim (1888), 1 L. R. A. 40, n., 35 Fed. Rep. 681, n.; Aylsworth v. Curtis (1896), 19 R. I. 517, 33 L. R. A. 110: cases; Payne's Appeal (1895), 65 Conn. 397, 33 L. R. A. 418, n. (specific property must be acquired; deceitful promise to marry will not survive).

Abatement of action by death of defendant. 87 Tenn. 442, 3 L. R. A. 212, n.; 5 Encyc. Pl. & Pr. 783-847.

Right to recover for personal torts not assignable, e. g., false imprisonment; not even after verdict, but before judgment. Hunt v. Conrad (1891), 47 Minn. 557, 14 L. R. A. 512.

Assignable; what things are. Assignatus utitur jure auctoris. L.C. 397.

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Who may sue. Parties. Usher v. West Jersey R. R. (1889), 126 Pa. 206, 12 Am. St. 806, n., 4 L. R. A. 261; 203 Pa. 511, 93 Am. St. 774.

A married minor is not a child. 93 Am. St. 777, n. *Mother of bastard can not recover for its homicide.* Robinson v. R. R. (1903), 117 Ga. 168, 97 Am. St. 156.

Death by wrongful act. 2 Kinkead, Torts, 465-480; Tiffany (1891); 5 Encyc. Pl. & Pr. 843-893.

Revival of action on death of party. Warren v. Furstenheim, *supra;* Sharon v. Terry, 36 Fed. Rep. 337, 1 L. R. A. 572.

ACTIO QUAELIBET IT SUA VIA: Every action proceeds in its own course. Jenk. Cent. Cas. 77. Codes abolish forms of action, but not the nature of causes. *Actionem genera,* etc.; SUBJECT-MATTER; Ashby v. White.

ACTON V. BLUNDELL (1843), 12 M. & W. 324, 67 R. R. 361, 13 Mor. Min. Rep. 168; U. S. v. Alexander (1892), 148 U. S. 186, 3 Kent, 439, 135 Ind. 561, 41 Am. St. 465, 2 Kinkead, Torts, 668-689; Cool. Torts, Ang. Wat., Kin. Irr., Suth. Dam., Wood, Nuis., 2 Wash. R. P. 353, 2 Gr. Ev. 467 n., notes Ashby; 1 Smith, Cas. 502. See *Aqua currit,* etc. Cited, § 326 Hughes' Proc.

An adjacent owner of land mining upon it is not liable for interfering with subterranean waters feeding a spring, and thereby destroying it. Acton; 99 Am. St. 55.

ACTORE NON PROBANTE REUS ABSolvitur: If the plaintiff does not prove his case the defendant is absolved. Hob. 103; 1 Whart. Ev. 621; 2 Cool. Tax. 915-926 (rationale of *onus* of proof); 1 Gr. Ev. 74-81 (burden of proof), pp. 2, 11, 16, 17, 18, 22; §§ 1, 5, 5*a*, 5*b*, 6, 7, 8, 9, 16, 18, 19, 21, 23, 24, 28, 48, 49, 79, 82, 103, 116, 145, 155, 214*a*, 350, Hughes' Proc. §§ 2, 4, 93, 108, 109, 118, 144, 159, 192, 223, 224, 269, 271, 272, Gr. & Rud. See *Semper,* etc. Bonnell: 185.

Governments accusatory must respect this maxims, along with Verba fortius accipiuntur contra proferentem; Dovaston. Inquisitorial and barbarous procedure excludes these maxims. The procedure of a constitutionalism depends upon these maxims and their cognates. These are:

Actori incumbit onus probandi: The burden of proof lies on the plaintiff. Hob. 103. *Actori incumbit probatio:* The burden of proof lies on the plaintiff; *Semper præsumitur pro negante; Semper necessitas probandi incumbit ei qui agit; Ei incumbit probatio qui dicit, non qui negat; Affirmanti non neganti incumbit probatio; Factum negantis nulla probatio; Probandi necessitas incumbit illi qui agit; Per rerum naturam, factum negantis nulla probatio est,* and *In genere quicunque aliquid dicit, sivi actor sivi reus, necesse est ut probat* (in general he who alleges anything, whether plaintiff or defendant, must prove it. Best, Ev. 252) are the roots of many rules of great discussions, and of thousands of cases. L. C. 185, 186.

Actore, etc., should be considered with *De non apparentibus et non existentibus eadem est ratio* (what is not juridically presented can not be judicially considered). U. S. v. Cruikshank.

The rationale of these maxims lies at

Actore.—

the foundation of the presumption, that no one is a wrongdoer until he is, *first,* alleged, and *second,* proven so. *Favorabiliores rei potius quam actores habentur.* Dovaston.

It is a general rule that defendants are most favored; therefore one making any claim or demand against another must state and prove it. Upon respect for these rules depends protection from condemnation and confiscation. This general principle may be gathered from the foregoing maxims as well as those we shall next mention, namely: *Judicis est judicare secundum allegata et probata; Frustra agit qui judicium prosequi nequit cum effectu, Verba fortius,* etc., *Judicium redditur,* etc., and *Præsumatur pro justitia sententiæ.*

In the foregoing are found limitations of that unbridled rule of construction—the theory of the case. *Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur.* Adams v. Gill.

"The manner of the Romans" required that the crime must be proved as laid. Semper præsumitur pro negante. All systems that are merciful and protecting require this. L.C. 135, 185, 186.

There must be both allegations and proofs under the requirements of due process of law. L.C. 219; U. S. v. Cruikshank, L.C. 232. See *Debile fundamentum fallit opus.* L.C. 291: cases. *See* ALLEGATIONS.

The practitioner must master the rationale of Actore, etc., of *Semper præsumiter pro negante,* also *Verba fortius accipiuntur contra proferentem.* From them are reflected the nature and the structure of government. *Actore* is one of the fundamentals of the prescriptive constitution. *Frustra probatur quod probatum non relevat.*

One is presumed innocent until he is proven guilty. Coffin v. U. S.: 185. One is not presumed in deliction until it is both alleged and proven. Allegations must exist, and *allegata et probata* must correspond. *See* ALLEGATIONS; L.C. 1-20, 135, 185, 186.

ACTOR QUI CONTRA REGULAM QUID adduxit, non est audiendus: A pleader ought not to be heard who advances a proposition contrary to the rules of law. *Allegans,* etc. One's record should show his right to a summons and his right to be heard, and for this he should allege enough and truly. L.C. 104. *See* ALLEGATIONS.

A cause must be stated according to its legal effect. The forms of the law are a part of the law. *See* ABATEMENT. *Actor sequitur forum rei:* The plaintiff must follow the forum of the thing in dispute. Story, Conf. Laws, 325*k*, 2 Kent, 462. *Lex fori.*

A first precept to be stated and deeply impressed is the law relating to the two records, namely, the mandatory and the statutory. Under all systems the general ideas relating to those records are the same, however much details may differ. *See* APPELLATE PROCEDURE. There is no new law as to those records; it is from of old and the law governing them is the prescriptive con-

Actor.—

stitution. §§ 83-123, Gr. & Rud. In all systems the above mentioned records are the means of evincing the requirements of procedure. Parts of the statutory record are the motion for new trial, which is so important to save exception matter in the statutory record; and founded thereon is the assignment of errors. Without this the statutory record is surplusage.

ACTS INDICATE THE INTENTION: *Acta exteriora.* L.C. 165.

ACTUS CURIAE NEMINEM GRAVABIT: An act of the court shall prejudice no man. Bro. Max. 122-126; Mitchell, 103 U. S. 64, 65; Dawson, 89 Mo. App. 250; Mead, 65 Mo. 552 (amendments of record); West v. S.; McCardle; Dunlap, L.C. 108; Freem. Judg. 56-60, 1 Rul. Cas. 203-367, n. Death pending proceedings and after trial; judgment may be entered *nunc pro tunc.* 1 Freem. Judg. 57-60. Cumber: 311. *Lex non exacte,* etc.; *Rex non potest peccare.*

Death after trial pending consultation as to entering judgment, will not delay that. Cumber.

ACTUS DEI NEMINI FACIT INJURIAM: The act of God is so treated by the law as to affect no one injuriously. Bro. Max. 230-242. *See* ACCIDENT. Fletcher v. Rylands; Nichols; Blyth v. Birm. Water Co.; Brown v. Kendall; "Squib Case"; Morgan v. Cox; Pollack; L.C. 309, 310; S. v. Harper; Brown v. Collins; Hallett; Bostwick; § 70, Hughes' Conts. §§ 302, 344, Hughes' Proc.

Cited §§ 69, 82, 293-296, Gr. & Rud.

Carrier's liability for goods destroyed by accident. Rogers.

ACTUS LEGIS NEMINI EST DAMnosus (or *facit injuriam*): An act in law shall prejudice no man. Bro. Max. 126, 127. Six Carpenters' Case, L.C. 165.

ACTUS ME INVITO FACTUS NON EST meus actus: An act done by me against my will is not my act. *Actus non facit,* etc. 1 Bish. C. L. 288. If one executes and delivers a deed or note from compulsion, this avoids the contract for duress. There is no mutuality of agreement where there is coercion. Sasportas.

An involuntary act is never the basis of liability; *e. g.,* the throwing of the squib by the intermediate throwers did not make them liable, as Blackstone, J., contended. R. v. Tyler.

ACTUS NON FACIT REUM NISI MENS sit rea: Act and intent must concur to constitute crime. Bro. Max. 306-326; 3 Gr. Ev. 13-21; 12 Cyc. 147; U. S. v. Kirby; U. S. v. Cruikshank, L.C. 232; P. v. Robey (Coke made this maxim prominent in his 4th Inst.) (exceptions; statutory crime; able decision by Cooley). Statutes often establish crimes in which intent is no element. However the general rule is expressed in the maxim. U. S. v. Anthony; C. v. Mash; R. v. Prince, *sub,* ABDUCTION, *ante;* R. v. Almon; Phelps v. Racey; Levett's Case; *Ignorantia facti excusat; ignorantia legis neminem excusat;* R. v. Esop; 12 Cyc. 155; McNaghten's Case (Insanity); Spies v. P. (Anarchist Case: Tacking and collateral intent); S. v. Homes (Larceny); U. S. v.

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Drew (Drunkenness); P. v. Rogers; R. v. Thurborn (Larceny); R. v. Riley (Larceny); S. v. Robinson; C. v. York; R. v. Wheatley; U. S. v. Cassidy (Conspiracy); C. v. Hunt (Conspiracy); R. v. Goodhall; R. v. Birmingham R. R.; R. v. Great North of England R. R. (Corporations); Henley v. Lyme Regis (Corporations); U. S. v. Kirby; R. v. York; Godfrey v. S. (Infants). And in extortion. *See* COSTS; *Ignorantia,* etc.; Calder v. Halket; Clarke v. May, *sub* Piper v. Pearson; Suth. Stat. 354, 355; see *Mens sit rea,* Bouv. Dic.; U. S. v. King; 1 Bush. C. L. 288, 291; 8 Rul. Cas. 16-89; *Actus non invitos,* etc.; § 63 Hughes' Conts. §§ 179, 306, 309*a*, 329, Hughes' Proc.

Cited §§ 293, 294, 304, Gr. & Rud.

Reference to the sections citing it will show it is a part of many leading rules. It should be comprehended in connection with these. Act and intent must be alleged with certainty. U. S. v. Cruikshank.

Exception in extortion, adultery and bigamy; adulteration of food. P. v. Flach (1891), 125 N. Y. 324, 11 L. R. A. 807, ext. n.; 1 McClain, C. L. 128 (exception in statutory crime).

Attempting to commit one crime and perpetrating another is criminal, like attempting to murder one person and killing another; this is murder. 1 Bish. C. L. 328. An illegal beginning cannot have a legal ending. But if one has a right to defend himself and aims at one and kills an innocent person, he is excusable.

Louis Cella, at Booth's request, innocently held his horse while he entered and shot Lincoln and then returned, mounted and rode away. Of course Cella was guilty of no crime. If the innocent nurse administers poison at the request of the doctor, she is not guilty.

One is not liable for consequences of a third person's act, whose participation was not contemplated, as the natural, direct and probable cause. "Squib Case"; C. v. Moore; Spies v. P.

ADAMS v. GILL (1895), 158 Ill. 190-196. *Cited,* § 23, Hughes' Proc.; § 57, Gr. & Rud.

Pleadings essential for a record and they must be filed, and reasons for this rule are stated to be for notice and trial purposes. A bill in equity was involved, and the only amendment for it was an oral proposition to amend. No written amendment was ever filed, nor did any order appear requiring defendant to plead to the amendment. After the trial the amendment was filed. This was held too late, and the absence of the order was held fatal.

The court rejected the "modern" rule called the theory of the case. See Munday v. Vail, L.C. 79, 83: cases; Fish: 12*a*; Campbell v. Greer (Mo.): 2*a*. Pleadings cannot be waived nor dispensed with. See Hughes' Proc., pp. 7-14. §§ 83-123, Gr. & Rud. See 1 Thomp. Tri., §§ 2310-2311; Borkenhagen v. Paschen (code), L.C. 81: cases. *Actore non probante,* etc.

Pleadings defined; to limit issues and narrow proofs as in Bliss Code Pl. 138. Other cases add, to apprise a party and to inform a court. Cases are rare that suggest their uses, as in Windsor v. McVeigh, L.C. 1. They should be considered from a comprehensive definition. Guedel v. P.: 74*a*; *see* JURISDICTION.

Adams v. Gill.—
See Illinois; New York; Indiana; Colorado. *See* THEORY OF THE CASE.
ADAMS v. LINDSELL: L. C. 326.
ADAMS v. NEW YORK (1904), 192 U. S. 585, 98 Am. St. 675, 201 U. S. 72. Cited § 271, Gr. & Rud. Pettibone.
Papers, documents and matters of evidence illegally seized and taken from a person are admissible in evidence against him, if only competent. Cluett, 106 Mich. 193, 43 Am. St. 446, n.; S. v. Mathews (1891), 64 Vt. 101, 33 Am. St. 921 (court will not collaterally inquire into), 1 Gr. Ev. 254*a*. See Ilsley; *Nemo tenetur seipsum accusare;* S. v. Edwards (1902), 51 W. Va. 220, 59 L. R. A. 465-477, ext. n. (*contra* cases); Evans v. S. (1899), 106 Ga. 579, 71 Am. St. 276, 11 Am. Cr. Rep. 695, n. (inadmissible).
A state may prescribe the evidence admissible in its own courts, and what is prima facie sufficient to convict. S. v. Thomas: 257; S. v. Beach: 259: cases; Phelps: 191: cases.
AD DAMNUM: Bouv.; And. Dic., 2 Gr. Ev. 260; *see* PRAYER; L.C. 140. §§ 51, 321, Hughes' Proc.; § 67 Gr. & Rud.
The declaration should in conclusion lay damages. And. Steph. Pl. 251. By the statement the court should be informed, and consistently with all the allegations, what is claimed as damages. The place for this notice and limitation of jurisdiction is in the *ad damnum*. McDermott v. Severe. Courts presume against a pleader and therefore will not assume nor hold that he is damaged beyond the amount claimed in the right place. This view was long maintained in Illinois, and is well stated in 71 Ill. 174: cases (instructive case). Such is the law in Coke's Reports. The *ad damnum* limits the recovery. 2 Gr. Ev. 260; Bouv. Dic., And. Steph. Pl. 251; see Van Fleet, Col. Att. 753; Suth. Dam. 414-417, 3d ed. (judgment may be entered beyond); 27 Minn. 528; 28 Wis. 268; 20 Wend. 144. See Hughes' Proc. Pain: 107; *Verba fortius.*
Pleadings confer jurisdiction, and they limit it. L.C. 1-20; U. S. v. Cruikshank; Sto. P:. 10. See Story; Adams v. Gill; 13 Cyc. 181. *See* ALLEGATIONS.
ADDISON v. GANDASEQUI: L. C. 343.
AD EA QUAE FREQUENTIUS ACCIdunt jura adaptantur: The laws are adapted to those cases which most frequently occur. Bro. Max. 43-46; End. Stat. 286; Heydon's Case. §§ 17, 43, 70, 172, 199, 254, 256, 287, 292, 295, 348, Hughes' Proc.
The above is a very instructive rule of construction. View-points of it are afforded from the following citation: Gibson, 143 Ill. 182, 36 Am. St. 376, 17 L. R. A. 588, 36 Am. St. 817 (intent controls in construction). *Cited,* § 348, Hughes' Proc. Harper: 218; Williams v. Chi. R. R.; *Ejusdem generis.* See *Roy n'est,* etc.; *Expressio eorum,* etc.; *In præsentia majoris,* etc.; *Verba intentione,* etc.; *Lex non exacte,* etc.; *Actio personalis,* etc. (illustrations).
If a town is so besieged that ingress and egress are impossible, then the service of process by publication should be inoperative against a defendant unable to enter that town in obedience to the summons. *See* Cooper v. Reynolds.
Great and important questions of jurisdiction may be reasoned from the ends and purposes of courts, as discoverable in preambles and bills of rights. See JURISDICTION; *Fabula non judicium; Jurisdictio est potestas,* etc.

Ad.—
ADEMPTION OF LEGACIES: Miller: 109 Ky. 133, 95 Am. St. 338-370, ext. n.
ADEQUACY: Of consideration. L. C. 332.
ADJECTIVE LAW. *See* Hughes' Proc. *Ubi jus,* etc.; Lampleigh: 301, Preface, also §§ 41, 62, 124*a*, 151, 197, 257, Gr. & Rud.
ADJUVARI QUIPPE NOS, NON DEcipi, beneficio oportet: For we ought to be helped by a benefit, not destroyed by it. Dig. 13, 6, 17, 3; Bro. Max. 392, n. Cited, § 17, Hughes' Proc.
Codes should be construed to advance the due administration of justice which must not be impeded, obstructed, hindered and defeated. Indianapolis, etc., v. Horst, L.C. 223. *Ab abusu,* etc.; *Cujus est instituere ejus est abrogare; Benedicta est expositio quando res redimitur a destructione.*
ADMINISTRATION: Equity has paramount jurisdiction. Trotter v. Mutual, etc., Ass'n. (1897), 9 S. D. 596, 62 Am. St. 887, Bouv. Dic., And. Dic., Brown, Jurisdic.; Story Eq.
Record essential for. Essential facts to confer jurisdiction. Rushton. Probate proceedings to sell real estate. L.C. 68, 266.
No probate binds a living person supposed to be dead. Jurisdiction attaches to things—facts—not words. Springer: 24; Taylor: 219*a*; Scott v. McNeal: cases. Allegation must be true in fact. L.C. 103.
Sale of a decedent's estate; legislative control of. Portus' Estate (1900), 129 Cal. 86, 61 Pac. 659, 79 Am. St. 78-92, ext. n. L.C. 68, 266.
Power of sale in wills and who may execute them. Crouse, 130 Cal. 169, 62 Pac. 475, 80 Am. St. 89-124.
Leases are personal property. Church. What assets pass to the administrator *de bonis non.* Hodge, 90 Me. 505, 40 L. R. A. 33-74, ext. n. Right to rent from lease of intestate's property. Walsh, 165 Mass. 189, 40 L. R. A. 321-345, ext. n. Probate proceedings to sell or mortgage. L.C. 68, 219*a*. Due process of law involved. *See* LETTERS OF ADMINISTRATION; Bouv. Dic. (Legacy.)
Effect of probate of will in another state. Martin, 103 Tenn. 1, 48 L. R. A. 130-153, ext. n. Probate of will. 2 Bouv. Dic. 763, 764.
Heir, who is. *In re* Ingram (1887), 78 Cal. 588, 12 Am. St. 80-113, n., 4 Kent, 374-418, 9 Rul. Cas. 287-305, n.
Domicile as affecting distribution. 2 Kent. 429, 2 Rul. Cas. 5-45; Wells, Jurisdic. 271-302; 8 Encyc. Pl. & Pr. 653-735; Woerner on Administration; Schouler on Ex. & Adm'rs. Founded on public policy. Hagthrop; Bro. Max. 705.
As a general rule letters may issue wherever unadministered property is found. Thormann v. Frame (1900), 176 U. S. 350.
Executors; common law powers of. Fletcher v. Am. Trust & Banking Co. (1900), 111 Ga. 300, 78 Am. St. 164-207, ext. n. Administrator *de son tort.* Brown v. Sullivan. Administrator *de bonis non.* Morrow v. Co. (1905), 100 Md. 256, 108 Am. St. 410-433, ext. n.
Generally: 6 Cyc. 957-970, 18 Cyc. 1-1367.

Administration.—
Summary proceedings to recover property of the decedent. Humbarger, 72 Kans. 412, 115 Am. St. 204-219, ext. n.

ADMIRALTY: Is from the Civil Law. See Genesee Chief. Torts in; damages, 4 Suth. Dam. 1286-1296; Bouv. Dic., And. Dic. Evidence in. 3 Gr. Ev. 386-487. Jurisdiction over the sea. Humboldt, etc., Co. v. Christopherson (1896), 44 U. S. App. 434, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264-288, ext. n.; And. Dic. (Sea); R. v. Keyn, L.C. 171.

Collisions: 7 Cyc. 299-397.

Forms in. Fost. Fed. Prac. 1345-1377.

ADMISSIONS: As evidence. 1 Gr. Ev. 169-212; 1 Ell. Ev. 220-270; 1 Cyc. 791-912; 16 Cyc. 988-1050; L.C. 183; Gillett, Indirect and Collat. Ev. 1-51; Bouv.; And. Dic. By agents. U. S. v. Gooding: 201; Boileau: 43; § 5, Hughes' Conts.; *see* also, Hughes' Proc., ADMISSIONS. Effect of. § 272, Gr. & Rud.; Bradbury: 35. When conclusive. §§ 54, 126, 165, 167*a*, 198, Gr. & Rud. Answer taken as true if not denied. *Id.*, § 126; *Qui ponit fatetur.* Uncertain denials are admissions. Dickson: 34; *see* DENIALS. Generalities are obnoxious. §§ 52, 71, 118, 152, 178, Gr. & Rud.; *Verba fortius*, etc.; *see* L.C. 34-45: cases.

Jurisdiction depends upon the allegation, the admission or the denial and the issue. Authority to proceed is gathered from the mandatory record; therefore whatever appears thereon is of the greatest force and dignity. *In præsentia majoris.* When admissions appear in that record they are conclusive. The only way to controvert material allegations is properly to deny them; so, the admission and the denial may be viewed as reciprocals. These will be introduced in relation to *Dickson v. Cole:* cases; L.C. 34-35. Admissions have a footing upon the law of convenience. § 53, Gr. & Rud. They can not be disregarded in rational procedure.

ADOPTION: Flannigan v. Howard (1902), 200 Ill. 396, 65 N. E. 782, 93 Am. St. 201 (statement for liberally construed); Wilson v. Otis (1902), 71 N. H. 483, 93 Am. St. 564, n.

Effect on kindred. Vanderlyn v. Mack (1904), 137 Mich. 146, 109 Am. St. 669-678.

Generally, Bouv. Dic.; And. Dic.

AD PROXIMUM ANTECEDENTEM fiat relatio, nisi impediatur sententia: A relative is to be referred to the next antecedent, unless the sense would be impaired. Bro. Max. 679-682; R. v. Waters: 70; R. v. Waverton: 71; Max. No. 27, §§ 286-288, Hughes' Proc.

AD QUAESTIONEM FACTI NON REspondent judices, ad quæstionem legis non respondent juratores: It is the office of the judge to instruct the jury in points of law, of the jury to decide on matters of fact. S. v. Croteau: 271; Sparf v. U. S., 156 U. S. 51-183, 10 Am. Crim. Rep. 168-227 (greatest resume). Also §§ 63, 152, 170, 269, 278, 312, Gr. & Rud.

Max. No. 4, §§ 89-103; cited §§ 14, 23, 39, 41, 51, 67, 89-103, 126-161, Hughes' Proc.

Bro. Max. 102-111; Schneir v. P., 23 Ill. 17; Capital Traction Co. v. Hof (civil cases); Hull, 138 Mo. 618; Fullerton, 121 Mo. 1; Merchants' Bank (civil cases); 2 McClain, C. L. 1070

Ad Quaestionem.—
(defamation, libel and slander); Bonnell: 185: cases (stating rules in civil and criminal cases).

This maxim is a part of due process of law, also of the division of state power, which are two of the conserving principles of procedure. *See* pp. 8-17 Hughes' Proc.; §§ 83-123, Gr. & Rud.

Province of the court and jury. S. v. Croteau: 271.

Duty of court to instruct as to the law where the facts are judicially established. Rosen: 92, 10 Am. Crim. Rep. 251, n.

Power of appellate court to reverse a cause and to enter final judgment. Borg, 162 Ill. 348; Cothran; McAfee v. Reynolds. *See* APPELLATE PROCEDURE.

Questions of fact determined in the trial court will not be reviewed in an appellate court, except for error affirmatively appearing. Insurance: 157; Cothran.

Agreed case, court must pass upon. L.C. 185; Dickson: 34: cases.

Court must examine entire record for admissions to act on. Dickson: 34: cases; § 5, Hughes' Conts.

Issue; subject-matter; different kinds of. See SUBJECT-MATTER; L.C. 271.

Issue must appear from the mandatory record. L.C. 79, 81: cases.

Court has no jurisdiction to pass on the weight of evidence. Williams, — Colo. —, 7 L. R. A. (N. S.) 1170. *See* CORAM NON JUDICE.

Courts cannot try what juries must try, e. g., the criminal case. Windsor; *cf.* Turney v. Barr; R. v. Dean of St. Asaph (1784), 3 T. R. 428, n., stated 156 U. S. 77 (10 Am. Crim. Rep. 196), also in all books printing the *Croteau* and *Burpee* and *Sparf* cases. See Erskine's Speeches. This maxim applies most strictly to the criminal case; less to the common law case, and still less in equity.

Judge cannot coerce jury. S. v. Etherby, 185 Mo. 178, 105 Am. St. 567-580, ext. n.

ADULTERATION: 1 Cyc. 939-949; See FOOD. Standard of purity: St. Louis, — Mo. —, 1 L. R. A. (N. S.) 918-940, ext. n. (milk).

ADULTERY: 12 Cyc. 950-966; Collins v. S. Secret cohabitation is not. P. v. Salmon, 148 Calif. 303, 113 Am. St. 268-276.

ADVERSE POSSESSION: *See* LIMITATIONS. Wilson, 56 W. Va. 372, 107 Am. St. 297, n.; Chastang, 141 Ala. 451, 109 Am. St. 45.

AEQUITAS EST CORRECTIO LEGIS generaliter latæ qua parte deficit: Equity is the correction of the law, when too general in the part in which it is defective. *Aequitas ignorantiæ opitulatur, oscitantiæ non item:* Equity assists ignorance, but not carelessness. *Aequitas non facit jus, sed juri auxiliatur:* Equity does not make laws, but assists law. *Aequitas nunquam contravarit legem:* Equity never contradicts the law. *Aequitas sequitur legem:* Equity follows the law. 1 Story, Eq. Jur., § 64; 65 Minn. 156. *Aequitas supervacua odit:* Equity abhors superfluous things. *See* VAIN, etc. *Aequum et bonum, est lex legum:* What is just, equal and uniform law is the law of laws. *Lex non exacte,* etc.

AFFIDAVIT OF DEFENSE: Of merits. Bliss, Code Pl. 422; And. Dic. 329; Defense; morality. To demurrers in federal courts. 1 Fost. Fed. Prac. 118; Bouv. Dic.

AFFIDAVITS: Their sufficiency. Beebee, 77 Mich. 114, 15 Am. St. 288-298, ext. n.; 1 Encyc. Pl. & Pr. 309-337; 1 Cyc. 1-39.

Attorney of party cannot take as a notary. Horkey v. Kendall (1898), 53 Neb. 522, 68 Am. St. 623. For attachment must be positive. Pain, Ex parte, L.C. 107. See DEPOSITIONS, And. Dic. In replevin. Cobbey, Replev. 525-603 (important rules of pleading). Affidavits for attachment and for replevin are jurisdictional. They belong to the mandatory record.

AFFIRMANTI, NON NEGANTI, INcumbit probatio: *Actore; Semper.* Burden of proof. L.C. 185, 187; 1 Gr. Ev. 71-83. Another form of this maxim is *Affirmantis est probare:* He who affirms must prove.

AFFRAY. Bouv. Dic.; 2 Bish. Cr. Proc. 16-30; And. Dic.; 2 McClain, C. L. 1006-1008; 1 Cyc. 40-50.

AGAR v. FAIRFAX (1811), 17 Vesey, 533, 2 Lead. Eq. Cas. (W. & T.) 835-919, ext. n., 34 Eng. Reprint 206; Mews' E. C. L., Pom. Eq., Sto., Bisph., Ad., Beach; Lind. Part. 59, 4 Kent, 364, 1 Wash. R. P. 676-700, Brown, Jurisdic.

Partition; jurisdiction; doctrines of. Agar; Killmer, 79 Iowa, 722, 8 L. R. A. 289, n.; Buckley, 102 Cal. 6, 41 Am. St. 135-151, ext. n. (in distribution of estates); Aydlett, 111 N. C. 28, 32 Am. St. 776-784, n. (when future contingent interests are involved); Weston, 137 N. Y. 119, 20 L. R. A. 624-631, n. (right of one out of possession to partition).

AGE: Of persons. Proof of. 69 Neb. 631, 111 Am. St. 577-591, ext. n.

AGENCY: §§ 298-301 Gr. & Rud. Maxims: cases. Disclosed and undisclosed principal; liability. Thomson v. Davenport: 342.

Maxims of: Qui per alium facit, facit per se; Respondeat superior; Qui sentit commodum sentire debet et onus.

Fellow-servants, doctrines of. Priestly, *sub* Farwell Case.

Contract duty, if violated, is a tort. Farwell v. R. R. *See* preface, Hughes' Conts.

Respondeat superior. Hilliard v. Richardson: cases; Priestly, *sub* Farwell Case.

One must take notice of the powers of an agent. Caveat emptor; Clark v. Des Moines.

Death of principal revokes the agency. Hunt v. Rousmanier; Smout v. Ilberry. Revocation of authority. Hunt.

Agent cannot be delegated to commit a criminal act. Poulton; Hughes' Conts., § 15.

Cannot act for himself in matters of the principal. Keech: cases; Michoud.

Agency involved in contract law. *See* Ans. Conts. 330-354; Hughes' Conts., § 25.

How agent must execute writing under statute of frauds. L.C. 390. Commercial paper. L.C. 410. To make a deed must be authorized by deed. Hibblewhite. Also to sign under statute of frauds, or to revive a barred debt. Hyde v. Johnson.

Torts of agent; principal liable for. M'Manus v. Crickett; Craker v. R. R.

The fraud of the agent is the fraud of the principal. L.C. 384, 385; Whart. Conts. 272-278.

Principal, when liable for criminal acts of agent. R. v. Almon. For torts. M'Manus v. Crickett; 1 McClain, C. L. 186-192, 207, 211.

Public agents; notice must be taken of powers of. Clark v. Des Moines.

Notice to agent is notice to principal. Ross v. Houston; Agra Bank v. Barry.

Real-estate agents and brokers. Warv. Vend. 210-249. Commission of, when earned. Walker v. Osgood (1867), 98 Mass. 348, 93 Am. Dec. 168-178, ext. n.; Gellatt v. Ridge (1893), 117 Mo. 553, 38 Am. St. 683, n., 43 L. R. A. 593-615, ext. n., 44 L. R. A. 321-352, ext. n.; Lunney v. Healey (1898), 56 Neb. 313, 44 L. R. A. 593-632, ext. n.

General and special agents. Batty.

Authority may be conferred by a course of dealing—usage or custom. Merchants' Bank. May arise from a course of dealing. Cook, Corp. 447; Moller.

Descriptio personæ words; how construed. L.C. 410. Oral evidence; when admissible to explain. L.C. 410.

Generally: Mechem, Story, Wharton, Huffcut, Reinhard, Tiffany, Marshall and Skyles on AGENCY. 2 Gr. Ev. 58-68*a*, 2 Suth. Dam. 768-800; Bouv. Dic. 114-121, And. Dic., 2 Page, Conts. 960-976.

AGGRAVATION: Bouv. Dic., And. Dic.

AGRA BANK v. BARRY (1874), 7 L. R., H. L. Cas. 135-158, 9 Moak, Eng. Rep. 94-116, n., 21 Rul. Cas. 786-819, ext. n. (purchaser for value without notice). See citations of this case; 26 *id.*, Mews' E. C. L.

Bona fide purchasers of real estate; facts and circumstances that should cause inquiry. Bassett: 395; Le Neve: 396.

AGREED CASE: Ell. App. Proc. 225-232; Encyc. Pl. & Pr. 384-406; Bouv. Dic.; And. Dic. *See* AWARDS. Admission of all facts amounts to an agreed case. *Sub* Bonnell: 185; Dickson: 34.

Presents only a question of law.

AIDER: By verdict, by judgment, by pleading over. This rule means that waiver will aid a defective statement; that consent will cure many errors, if these be of waivable or of exception matter. *Consensus,* etc.; § 53 (Convenience) Gr. & Rud.; *see* WAIVER; §§ 5*a*, 30, Hughes' Proc.

Aider by verdict. R. v. Goldsmith: 20; 1 Gr. Ev. 19; Dobson; Crogate; Bro. Max. 182, 602; §§ 53, 58, 230, Gr. & Rud.

Aider is a liberal rule of construction, and is a paraphrase of Ut res magis valeat quam pereat. Before it is applied, the mandatory requirements for the conserving principles of procedure must be first respected. §§ 83-123, Gr. & Rud. It has no place in conflict with the rule of the general demurrer, which is, that it searches the substantial pleadings and attaches to the first fault; this rule is paraphrased by the code requirement that the statement shall contain a cause of action, and that filing an answer will not waive that essential. A statement defective for substance cannot be cured by waiver. Sto. Pl. 10; Campbell v. Porter: 2; Campbell v. Greer: 2*a*; Adams v. Gill (Ill.). See *Argumentum.*

Waiver attaches and operates at the stage where prompt and apt objection and ex-

Aider.—

ception are omitted, also by failure again to present exception matter in the motion for a new trial, and further and at the last stage by failing properly to assign error thereon. L.C. 296; § 53 (Convenience), Gr. & Rud. ATLANTIC.

Aider by verdict involves the discussions of Dobson: 232*a* and *Jackson v. Pesked, sub* Dovaston: 217, also of *Rushton*: 5; 1 Gr. Ev. 19; Bro. Max. 182; And. Steph. Pl. 230, 2nd ed.

Aider by verdict is not an accurate and precise suggestion. As expressed it is calculated to mislead. It is only a waiver of formal, of dilatory, of abatement, of exceptional matter. Consult L.C. 2, 5, 11, 12, 19, 20, 21, 70, 71; §§ 83-123 Gr. & Rud.; 1 Chit. Pl. 239, 681 (703-716, 16th ed.); Bliss. Pl. 436-442; Wade Notice, 1401; Deitsch; Devine v. Los Angeles; *Quod ab initio*, etc.; *see* CAUSE OF ACTION; ALLEGATIONS; R. v. Goldsmith: 20 (liberal rule); 1 Gr. Ev. 19; Bro. Max. 182, citing Jackson v. Pesked, 1 M. & S. 234, *sub* Dovaston: 217; Dobson: 232*a*.

An answer may aid a complaint, has been held. Boyd: 62; also a reply. *See* REPLY. *Contra:* Devine (U. S.), also that:

Material allegations are aided. L.C. 28.

Conclusions of law not aided. See CONCLUSIONS; Hanford: 86; Mallinckrodt: 12*a*.

Plea of general issue aids defective allegations. Illinois Steel Co. (1902), 195 Ill. 106; Sargent Co., 215 Ill. 428 (liberal rule); *see* Brown v. City (Mo.).

In Illinois, New York, Indiana, Missouri and Colorado, where pleadings and records are waived many conflicting cases are found. 64 Cent. Law Jour. 128-134. 167-174. *See* Preface, DATUM POSTS.

Defences not pleaded are waived. L.C. 33; Kirven; *see* observations under Rushton: 5 as to Statute of Jeofails and Aider.

AIDING AND ABETTING. Bouv. Dic. And. Dic.; McClain, C. L.; Spies.

A JUSTITIA (QUASI A QUODAM fonte) omnia jura emanant: From justice as a fountain all rights flow.

ALDOUS. See Master v. Miller.

ALDRICH. *See* MARSHALLING; ASSETS.

ALDRICH v. WRIGHT (1873), 53 N. H. 398, 16 Am. Rep. 339-371; 2 Green, Crim. Law Rep. 307, Ames, Torts, 118. §§ 294, 295.

Defense of person and property; right to kill animals. Four minks belonging to Aldrich entered Wright's premises and attacked his geese in a pond. He shot the minks to protect his geese, and for this A. sued W. for their value. *Held:* W. was justified. 2 Wat. Tres. 899-1003; Williams v. Dixon (1871), 65 N. C. 416; stated, Wood, Nuis., 837, 1 Wat. Tres. 158-170, 1 Bish. C. L. 836-877.

Owner of property may defend its possession, and make full resistance to any attacks upon that possession. P. v. Kane (1892), 131 N. Y. 111, 27 Am. St. 574, n.; Alberty v. U. S. (1895), 162 U. S. 499, 40 L. ed. 1051, n.; Squib Case.

Defense of the habitation. Semayne's Case; *Domus sua cuique*, etc.; 1 McClain, C. L. 312, 348 (excessive violence in causing death).

Man traps; dangerous instruments. Defense of premises with, is unlawful. Bird v. Holbrook; Hooker v. Miller; 1 McClain, C. L.

Dogs; right to kill. *See* DOGS. Trespassers; right to kill. Bird v. Holbrook; 93 Am. St. 258-260. Self-defense cases: C. v. Selfridge; McClain, C. L. 138-144. Right to make. U. S. v. Holmes; L.C. 194; 93 U. S. 258-260: cases; 1 McClain, C. L. (as a branch of the law of necessity), 246, 301-316, 311 (duty to retreat); 312 (against felony or invasion of homes); 314 (right to pursue assailant); 316 (burden of proof).

Aldrich v. Wright.—

ALIBI: Proof of. S. v. Ardoin (1807), 49 La. Ann. 1145, 62 Am. St. 678, n.; S. v. Thornton (1897), — S. D. —, 41 L. R. A. 530, ext. n.; Bouv. Dic., And. Dic., Bish. Cr. Proc. 1061-1068; S. v. Crowell (1899), 149 Mo. 391, 73 Am. St. 402; 1 McClain, C. L. 399; 12 Am. Rep. 13-30; 2 Cyc. 79.

ALIENATION: *Alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri, et quilibet potest renunciare juri pro se introducto:* Although alienation be prohibited, yet, by the consent of all in whose favor it is prohibited, it may take place, for it is in the power of any man to renounce a right introduced for his own benefit. *See* ALIENATION.

Alienatio rei præfertur jure accrescendi: Alienation is favored by the law rather than accumulation. Bro. Max. 441-459, 8th ed.; Thelluson; Walkerly; Field v. Mayor; L.C. 397; Warmstrey v. Tanfield; Row v. Dawson; L.C. 398; Taylor v. Horde; Egerton v. Brownlow.

This principle has greatly influenced the prevailing liberal rule of assignments.

Alienation pending a suit is void. Serrel v. Carpenter (1728), 2 Eq. Cas. Abr. 680, Pl. 7, 24 Eng. Reprint 825; 2 P. Wms. 482; Garth v. Ward (1741), 2 Atk. 174, 26 Eng. Reprint 509; 11 Ves. 194; 1 Johns. Ch. (N. Y.) 566, 580. Assignment. See Tilton v. Cofield; *Lis pendens;* NOTICE. *Pendente lite.* See Grain v. Aldrich; Gradwohl v. Harris. Of affections. *See* TORTS. Lynch v. Knight: cases; Ashby v. White: 273: cases.

ALIENS: Alien enemies cannot sue. Griswold v. Waddington (1819), 16 Johns. 458; Snow, Int. Law, 214: cases; 1 Kent, 66-68, 2 *id.* 46-47; Calvin's Case (1608), 7 Coke, Rep. 1; 2 Rul. Cas. 575; Galpin v. Page, 3 Sawyer, 93. *See* ALLEGIANCE; NATURALIZATION; 2 Bouv. Dic. 469, 470. § 296 Gr. & Rud.

Plea of alienage must be certain. 2 Gr. Ev. 19; Sto. Pl. 722, 724; Bro. Max. 187. *See* ABATEMENT.

Status of; right to sue. Disconto, 127 Wis. 651, 115 Am. St. 1063: cases.

Federal courts; aliens cannot sue in. Sawyer v. S. M. Ins. Co. (1878), 14 Blatch. 451. See Meyer v. Delaware, etc., Co. (1879), 100 U. S. 457-482, 25 L. ed. 593, n. See also works on Federal Procedure; Citizenship; Removal of Causes. RESIDENT, Bouv. Dic.

Penal statutes may sometimes be enforced by. Romano, 125 Ia. 591, 106 Am. St. 323; *Actio personalis.*

Generally: Bouv. Dic.; And. Dic.; Ans. Conts. 84, 181, Whart. 93, 94, Smith, 367, 2 Cyc. 81-130.

ALIMONY: *See* DIVORCE. Depends on marriage. Werner v. Werner (1898), 59 Kan. 399, 68 Am. St. 372 (division of property accumulated during a void marriage); And. Dic.; Bouv. Dic.; Eickhoff v. Eickhoff (1902), 29 Colo. 295, 93 Am. St. 64, n.

Alimony.—

May be enforced by contempt proceedings. *In re* Cave (1901), 26 Wash. 213, 90 Am. St. 736. See 102 Am. St. 694-712. § 308, Hughes' Proc.

To pay traveling expenses of wife to apply for a divorce.. Cairnes v. Cairnes (1902), 29 Colo. 260, 93 Am. St. 53, n.

No impairment of contract to reduce order for. Livingston, 173 N. Y. 377, 93 Am. St. 600, n.

ALIUD EST CELARE, ALIUD TACERE: To conceal is one thing, to be silent another. *See* DECEIT; *Caveat emptor.*

The buyer must look and judge for himself when the seller is silent, and there is no implied warranty. But the latter must not conceal defects. Pasley: 375: cases. Carter v. Boehm (insurance: assured must take care of the underwriters).

ALLEGANS CONTRARIA NON EST audiendus: He is not to be heard who alleges things contradictory to each other. Bro. Max. 169-174, 294; Bish. Conts. 880, 264-311; 2 Lang. Conts. 1088; Seattle (inconsistent defenses not permissible); Dickson v. Cole: 34 (a plea of confession and avoidance overcomes a general denial); Crater; *Posito*, etc.; Clayton (renewal of leases); Allen v. S.; Bristow: 135; Pain: 107; Smith v. Hodson: 156 (election); Terry v. Munger; Cobbey, Replev. 559; Pickard v. Sears; Horn (able *resume*); Freeman; Holman v. Boyce; Swan Case; Hibblewhite; 44 L. R. A. 846-860; *see* EQUITABLE ESTOPPEL; *Consensus tollit errorem; Allegans suam turpitudinem non est audiendus.* Cited, §§ 5, 11, 18, 43, 69, Hughes' Conts.

Maxim: No. 15, §§ 180-186; also *cited*, §§ 5*b*, 17, 18, 22, 23, 25, 120, 128, 134, 137, 145, 148, 152, 167, 168, 169*a*, 174, 177, 180-186*a*, 214*a*, 306-308, 311, 324, 331, 337, 354, Hughes' Proc.

Cited, §§ 47, 71, 91, 150, 171, 173, 258, 278, 295, 302, 308, 313, Gr. & Rud.

A ground and rudiment of law. §§ 47, 312, Gr. & Rud.

The idea in this maxim is the origin of all estoppels. Phases of it are presented under ESTOPPEL OF RECORD: *Res adjudicata:* Kingston's Case: Wright: 28; Estoppel by Deed: Christmas; Equitable Estoppel: Horn v. Cole: Pickard; Inconsistent Judicial Procedure: Baily: 44 (*see* THEORY OF THE CASE); Election: Smith: 156. Around the idea of *Allegans*, etc., is to be noted the greatest development of the doctrines within fifty years. Kingston's Case is now expanded into a dozen volumes upon *res adjudicata* under one title or another. From a viewpoint of deceit and misrepresentation a work on estoppel should be consulted.

Inconsistent proceedings not permissible in judicial procedure. L.C. 107; Rideout; Sto. Pl. 253*a*. *Allegata et probata* must correspond. Hart, 221 Ill. 444. Oscanyan. *See* ELECTION; CONFIRMATION; RATIFICATION. 2 Black. Judg. 632, 678; Terry; Baily. See *Consensus tollit errorem.* §§ 13, 15, Hughes' Proc.

Admissions in records sought, and control. L.C. 34; *Posito*, etc. *See* ADMISSIONS; *Ad quæstionem*, etc. Replying to a bad plea in equity and compelling a defendant to prove it. concludes a complainant. Sto. Pl. 697. *See* DEMURRER: cases.

Allegans.—

Repugnant pleadings void. Pain: 107. A plea of recoupment admits the validity of the contract. Ansley v. Bank.

Duplicity, double pleading, not permissible. One can not demur and plead at the same time. L.C. 9. *See* ELECTION.

One can not approbate and reprobate. Bro. Max. 711; Kerr v. Wauchope (1819), 1 Bligh, 1-27, 1 Rul. Cas. 310; 4 Eng. Reprint 1; Gandy v. Gandy (1885), 3 Chan. Div. 57-83, 1 Rul. Cas. 316-328, 3 *id.* 315, 2 Smith L. C. 886, 937 (8th ed.), 1 Herm. Estop. 337: cases. Equity rule. Streatfield, *post:* cases. "One who does not speak when he ought shall not be heard when he desires to speak." *Consensus.*

Accepting the fruits of a void judgment estops one from contesting it. 12 Colo. 434, 13 Am. Stat. 234, n.; Van Fleet, Coll. Att. 860-867. *Qui sentit*, etc.; Bro. Max. 171: cases; 63 Mo. 22; 7 Ill. 424; Van Rensselaer, 11 How. 326; Terrell, 32 Fla. 255, 37 Am. St. 94. *See* RATIFICATION.

Phases of this maxim are extendedly discussed in reference to deceit and misrepresentation in Ewart on Estoppel (valuable *resume*). Pasley: 375; Ellis v. Newbrough, *sub* Horn v. Cole (estoppel *in Tae*). L.C. 34.

The following quotation is a very important rule in procedure:

"It is proper to observe, that the effect of what takes place in one judicial proceeding, upon another, is sometimes due to the doctrine of equitable rather than legal estoppel, and that a man who obtains or defeats a judgment by pleading or representing an act or adjudication in one aspect, will be precluded from giving it a different or inconsistent character in a subsequent suit founded upon the same subject-matter."

Hayes, 1 Pa. St. 220; Varick, 11 Paige, 289; Queen, 10 Q. B. 563, 571; Ogden, 15 Ind. 56; Brantley, 5 Jones' Eq. 332; Carlisle v. Foster, 10 Ohio, 198; Martin v. Ives, 17 S. & R. 364; Wills v. Kane, 2 Grant, 60; Scaggs v. R. R., 10 Md. 268; Banks, 27 Pa. St. 172; Phil. R. R. v. Howard, 13 How. 307-311; 1 Herm. Estop. 337.

Pleading a former recovery in bar, or taking advantage of it in any other way, as valid, will preclude the right to reverse it for error or allege that it was fraudulent or void. Martin; Bailey: 44.

A party who leads a plaintiff to believe that he has given a recognizance for the appearance of the defendant, cannot subsequently show that the recognizance is invalid. Hawley, 28 Conn. 527.

In Bailey, a married woman was held to be estopped from appealing from a decree of divorce, by suing her husband in replevin and recovering judgment, as if she were sole. The rule applies conversely, and a defendant who obtains judgment by impeaching an instrument cannot rely on it as a defense in another suit brought by the same plaintiff: Philadelphia R. R. These cases rest on the well settled principle, that a man who elects to affirm that which he might avoid cannot alter his mind in a way to be injurious to third persons. Marsh v. Pier, 4 Rawle, 273, 286, 1 Herm. Estop.

Allegans.—
337; Smith: 156; 2 Smith, Lead. Cas., 797; notes, Kingston's Case.

Allegations made in one case are evidence in another. L.C. 43; 115 U.S. 363; Terry. Affidavit in replevin as to value is conclusive in another suit.

Allegans contraria. An election once made is final and conclusive. Smith: 156. One cannot change his base on appeal. Garland: 297; 2 Black, Judg., 632, 678.

Claim of ownership can not be contradicted by a tax payer. Inland, 11 Idaho, 508, 114 Am. St. 274.

Equitable estoppel pervades all subjects and particularly procedure. Hughes' Proc., §§ 180-186. Horn v. Cole (a masterly and exhaustive case); Pom. Eq. 802-812; 2 Beach, Eq. 1090-1113; Pickard; Freeman; 11 Rul. Cas. 82-104, n. (with Pickard, excellent *resume*); Roach, 57 Miss. 490; Lindsay (silence as an element); Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. 210, 13 L. R. A. 270, ext. n. (defining and stating elements); Pasley; Ewart on Estop. (finest *resume*).

Theory of the case in some states estops. Denoy v. St. Louis (1905), 192 Mo. 201; S. v. O'Neill (1899), 151 Mo. 67, 81 (one is not permitted to "tread back and trip up the heels of his adversary"); Hall v. Goodnight (1896), 138 Mo. 577. *See* MISSOURI, ILLINOIS, NEW YORK, INDIANA and COLORADO. L.C. 79: cases; Shutte v. Thompson: 291.

Ambiguous pleadings fatal to the pleader. Dovaston: 217; Lea: 30; Dickson: 34.

The student will be instructed by considering, *Allegans, Consensus, Modus et conventio, Nullus commodum*, collectively.

ALLEGANS SUAM TURPITUDINEM non est audiendus: One alleging his own infamy is not to be heard. Walton; 1 Gr. Ev. 383; 1 Wigm. 529. See *Allegans contraria*, etc.; Davis, 94 U. S. 423; Walton v. Shelly. One cannot stultify himself, was the rule of Coke in *Beverley's Case*. This maxim indicates the morality of the law.

ALLEGARI NON DEBET QUOD PROBATUM non relevat: That ought not to be alleged which, if proved, would not be relevant. *Frustra*, etc.; *see* SURPLUSAGE. Allegations control and limit proof. L.C. 5, 19, 291; 1 Gr. Ev. 63; 2 *id.* 7; 3 *id.* 10; Acts of the Apostles, chaps. 22-26.

ALLEGATA ET PROBATA MUST correspond. Bro. Max. 629; L.C. 135-137; *Allegans contraria*, etc.; 1 Bigl. Fraud, 179; *see* THEORY OF THE CASE; Southwick v. Bank, stated under Rushton: 5; *Judex debet*, etc.; Adams v. Gill. *Cited*, §§ 5, 5*a*, 8, 15, 16, 17, 18, 66, 181, 245, 260, 334, Hughes' Proc.; *cited*, §§ 24, 60, 76, 118, 144, 167, 167*a*, 205, 224, 271, 272, 278, Gr. & Rud.

Variance destructive of the conserving principles. § 205, Gr. & Rud.; *see* VARIANCE.

What is not juridically presented can not be judicially considered. Huntsman: 231; *De non*, etc.; *Frustra probatur*, etc.; § 118, Gr. & Rud.; *see* VARIANCE; DEPARTURE.

Allegations are essential and must be proved as laid. *Actore*, etc.; *Ei incumbit*, etc.; *Judicis*, etc.; Rushton: 5; L.C. 81, 291; Saunderson, *see* Dorn v. Farr (Variance); Hart, 221 Ill. 444.

Frustra probatur, etc. Rule of, involved with the conserving principles. Huntsman: 231.

ALLEGATIO CONTRA FACTUM NON est admittenda: An allegation contrary to a deed is not admissible. *See* ESTOPPEL; Beverley's Case; Collins v. Blantern.

The efficacy of a seal is much impaired by many decisions. Gibson v. Warden; Reinh. Ag.

ALLEGATIONS: Essential to confer jurisdiction. Cruikshank: 232; Continental: cases; 49 Fla. 293, 111 Am. St. 95; §§ 5*a*, 19, 22, 29, 44, 73, 113, Hughes' Proc; § 67, Gr. & Rud.; *see* CREDITORS' BILLS; Crogate's Case.

Essential to confer jurisdiction of a subject-matter. See JURISDICTION; §§ 56-61, 101, 102, 124, 144, 165, 166, Gr. & Rud.

General, when sufficient. Dobson: 232*a*; § 169, Gr. & Rud. *See* PROLIXITY; AIDER.

Conclusions of law are insufficient; these are opposed to convenience. U. S. v. Cruikshank; Hanford: 86; § 60, Gr. & Rud.

Cognate maxims and cases: Frustra probatur quod probatum non relevat (it is vain to prove what is not alleged); Adams v. Gill; Fish: 12*c*; *Actore non probante reus absolvitur; Allegata et probata* must correspond; *Verba fortius accipiuntur contra proferentem; De non apparentibus et non existentibus eadem est ratio;* Bristow: 135; Perry: 136*a*; Hart, 221 Ill. 444.

Fundamental law.—The prescriptive constitution requires pleadings. A government that proceeds accusatory in form and which is not inquisitorial or barbarous must condemn and sequester upon only allegations and proofs. And it must provide for both allegations and proofs; each of these is indispensable for "due process of law" (L. C. 219), and they must be safeguarded, established and administered according to the forms of the law (*A communi observantia*, etc.; *Actor qui contra regulam*, etc., *ante*). These forms involve the ceremonies of the division of state power which often appear as technicalities but which are nevertheless the safeguards of protection. They are requirements emanating from the very nature and structure of government; upon them depend our rights and liberties. There must be allegations for a pleading and there must be a pleading for a record and there must be a record to bind the court. A court is bound by its record; if it were not then it could do as it pleased. Its *dicta* would be arbitrary edicts of the most dangerous and insidious character. Where allegations are waived is seen an establishment that can at caprice or whim, for affections or from antipathy, become a mystic force of arbitrariness, oppression and tyranny. An absolutism and a consti-

Allegations.—
tutionalism are not more widely separated than by black upon white; they lie dreadfully and fearfully and often temptingly close. And, wherever the functions of the mandatory and of the statutory records are jumbled and confused there is opened the way for the "theory of the case," a euphemism advocated in some quarters to the extent of waiving the pleadings and of construing them in favor of a pleader; of denying *Verba fortius*, etc., *supra*. Dovaston: 217.

From the conserving principles of procedure is to be traced the necessity for allegations, the pleadings. §§ 83-123, Gr. & Rud. Those principles are not understood by intellects who advocate the theory of the case. 2 Thomp. Tri., §§ 2310, 2311; And. Steph. Pl., § 230: cases, 2nd ed. They do not understand the mandatory record and its functions; they do not understand the conserving principles of procedure, and that these profoundly implicate constitutional law, and carry with them the prescriptive constitution. There must be pleadings. Montana; Fish: 12*c*; Campbell v. Greer: 2*a*. And necessary allegations in the right pleading in the right record. Devine v. Los Angeles, 177 U. S. 78. If in the caption that will not do. Jackson v. Ashton; Kolze v. Hoadley (1906), 200 U. S. 76; Boyd: 62; *see* AIDER.

Pleadings cannot be stipulated nor contracted away. They are the mandatory requirements of a constitutionalism. Campbell v. Greer: 2*a*; Campbell: 2; Mallinckrodt: 12*a*; Cruikshank: 232; Doremus v. Root (1899), 94 Fed. 760; Walker v. Collins, 167 U. S. 57, 60 (removal of causes depends on. *Expressio unius*, etc.)

Parties cannot contract a procedure unto themselves in opposition to public policy. Hughes' Conts. 14-18; Sto. Pl. 10; 64 Cent. Law Jour. 128-134, 169-174; Well v. Green County (1878), 69 Mo. 281, 286; Wabash R. R. v. Young (1904), 162 Ind. 102, 4 L. R. A. (N. S.) 1091; Fish: 12*c*; *see* Franklin Union v. P. (1906), 220 Ill. 355, 110 Am. St. 248, 4 L. R. A. (N. S.) 1001 (jurisdiction depends on only two things: 1. Appearance; 2. A judgment entry which the court had power under general law, without regard to description or identification of subject-matter, to make; in other words, a judgment which the court could or might have made without regard to its authority from the record before it). R. R. v. Swan (1883), 111 U. S. 379; Timmons v. County (1890), 139 U. S. 378; Slacum; Montana.

Evidence from the statutory record will not supply allegations. Lynch v. Foley (1904), 32 Colo. 111; *cf.* Hume v. Robinson (Colo.): cases. also 2 Cyc. 689-691.

Probata cannot aid *allegata*, but verdict may aid. Ind. Traction, — Ind. —, 7 L. R. A. (N. S.) 143; *see* Hitchcock: 12.

Proof cannot go beyond allegations. L. C. 19.

Must be certain, consistent and *bona fide*. Repugnancy avoids. L.C. 107; *see* ALTERNATIVE; SHAM PLEADINGS.

Allegations.—
Form of making in admiralty, also under codes. Fost. Fed. Prac. 1345-1348.

It must be charged that a crime was committed in an indictment for compounding the offence. *See* COMPOUNDING.

ALLEN v. FLOOD (1897), A. C. 1-81, 17 Rul. Cas. 284-356, ext. n.

Enticing one to break a contract, when actionable. Bowen v. Hall (1881), 6 Q. B. D. 333-344, 1 Rul. Cas. 717, 1 Smith L. C. 292 (11th ed.); 96 Tex. 443, 97 Am. St. 714; 105 Fed. 163, 62 L. R. A. 673-699, ext. n.; Mogul Co. v. McGregor (1889), 23 Q. B. D. 598; *see* Lumley; Lynch; MOTIVE; MALICIOUS ACTS.

ALLEN v. INHABITANTS OF JAY (1872), 60 Me. 124, 11 Am. Rep. 185-200, 12 Am. Law Reg. 481-500, ext. n.; Thayer Const. Cas.; S. *ex rel.* New Richmond, 114 Wis. 652-682.

Sequestration of property—due process of law. P. v. Town of Salem; Taylor: 219*a*; Loan Assn. v. Topeka; S. v. Kelly.

ALLEN v. S. (impeaching witnesses; rules stated; ablest *resume*). L.C. 203. *Cited*, Hughes' Proc. 354; § 272, Gr. & Rud.; see *Falsus*, etc.

ALLEN v. WRIGHT (arrests). L.C. 167.

ALLENSPACH v. WAGNER (1886), 9 Colo. 127, 132. A reply essential. Hubler (Ind.). May be waived. Quimby (Colo.); Hume: cases; *see* Munday: 79: cases.

ALTERAM NON LAEDERE: Hurt not thy neighbor. *See* JURIS PRAECEPTA. Burdick's Torts, 3, 4.

ALTERATIONS: Master v. Miller: cases (rules stated). *Cited*, § 318, Hughes' Proc.

ALTERIUS CIRCUMVENTIO ALII non præbet actionem: A deception practiced upon one person does not give a cause of action to another. Only an injured person can complain. Williams v. Eggleston: 94 (essential parties jurisdictional. *Actio non datur*, etc.). Or assign error. Gibler: 96.

A wronged person is required as an element in "due process of law." Murray: 219.

ALTERNATIVE: Pleadings cannot be in the alternative. *See* ALLEGATIONS, *ante*. Pain: 107. *See* HYPOTHETICAL; ARGUMENTATIVE; AMBIGUITY; CERTAINTY; DUPLICITY; AMBULATORY; RES ADJUDICATA. Green v. Palmer: 90 (code). DISJUNCTIVE PLEADINGS: 1 Bouv. Dic. 582; And. Dic.; Sto. Pl. 240-252; 123 Wis. 297; 69 L. R. A. 601, n. *Cited*, § 91, Gr. & Rud. Posito, etc.; *Allegans*.

Alternativa petitio non est audienda: An alternative petition is not to be heard. *See* REPUGNANCY. Alternative pleadings are void. Pain: 107. Likewise ambiguous denials. L.C. 34: cases. See *Ambigua responsio*, etc.; *Ambiguum placitum*, etc.

When a statute describes an offense by an alternative, a summary conviction stating the offense in the alternative, but not stating which of the alternatives has been committed, is a fatal defect, and is so after trial and sentence. Pain; *Res adjudicata;* Lea; Moynahan v. P. (Colo.).

And such is the rule in civil cases. Sto. Eq. Pl. 245, 245*a*, 254, 510; And. Steph. Pl. 204 (Tyl. ed. 339). Also in affidavits for attachment. Drake, At-

Alternative.—

tach. 101*a*. *See* Cobbey, Replev. 557. And, the rationale applies to a defendant. Dickson v. Cole: 34: cases. *See* Pain: 107. *Ambiguum placitum*, etc.; *Ambigua responsio*, etc.; *Verba fortius*, etc.

Promises. 2 Whart. Conts. 619-624.

AMBASSADOR: 2 Cyc. 259-278. Jurisdiction of. *See* CONSUL. *Fabula non judicium.* Of violence to. 2 McClain, C. L. 1342.

AMBIGUA RESPONSIO (OR PLACITUM) contra proferentem est accipienda: An ambiguous answer is to be taken against the party who offers it. *Verba fortius*, etc.; Dovaston: 217; *Ambiguum placitum.* §§ 16, 38, 43, Hughes' Proc. Repugnancy defeats a plea of *res adjudicata.* Lea: 30; Pain: 107.

Denials must be direct, certain and positive under codes. However, many courts depart from the maxim. Dickson: 34: cases. *See* AMBIGUITY.

AMBIGUITY: How construed.. *See* ORAL EVIDENCE; 2 Cyc. 278. § 10, Hughes' Conts.; Ans. Conts. 247. Oral evidence to explain. § 87, Hughes' Conts.; §§ 223, 228, 229, 232, Hughes' Proc. Is construed against the pleader. Dovaston: 217; Lea: 30; Pain: 107; Dickson: 34.

Wills: correction of description of land. Lomax, 218 Ill. 629, 6 L. R. A. (N. S.) 942-977, ext. n.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur: Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact, may, in the same manner, be removed. Bro. Max. 603-618; Oliver v. Henderson, 121 Ga. 836, 104 Am. St. 185 (approving Bacon's rule). *Contra:* Brown v. Spofford (parol evidence).

Max. No. 15, §§ 223-232, Hughes' Proc.; Aspden's Estate; Sargent v. Adams; Woollam v. Hearn: 53; Pym v. Campbell: 52 (oral evidence); Bauerman v. Radenius: 48; Lester v. Foxcroft: 341; 1 Gr. Ev. 297-301. See *Falsa demonstratio*, etc.; Blair v. Reading: 170; And. Dic.; § 87, Hughes' Conts.

Admissibility of oral evidence to make certain. *See* ORAL EVIDENCE.

Ambiguitas verborum patens nulla verificatione excluditur: A patent ambiguity is never holpen by averment. Bacon, Max. 25; Bro. Max. 608; 1 Tex. 377, 383; 1 Gr. Ev. 297-301.

Ambiguous; pleadings must not be. Moore: 21; L.C. 29; Pain: 107; U. S. v. Cruikshank: 232; Atlantic. *See* AMBULATORY; ARGUMENTATIVE; ALTERNATIVE; DUPLICITY; INTRODUCTORY.

Every presumption is against a pleader, is a paraphrase for the maxim *Verba fortius*, etc.; Dovaston: 217. This rule is applied when pleadings are ambiguous, or too indefinite to identify. In *res adjudicata* tests it is the same rule, but is applied thus: Estoppels are odious and are strictly taken. See *Res adjudicata.*

Ambiguum placitum interpretari debet contra proferentem: An ambiguous plea ought to be interpreted against the party pleading it. Bro. Max. (8th ed.) 601; Bacon, Max. Reg. 3. *Verba fortius*, etc.; *Ambigua responsio*, etc.; *Volenti non fit injuria;* Sto. Pl. 665. §§ 16, 38, 43, Hughes' Proc.

Ambiguity.—

Defendants must properly plead. Dickson v. Cole; L.C. 34-44: cases; Harvey v. Brydges.

Ambiguous contract void; e. g., "Bought of Hall & Co. all the colored noils for the year 1887, at 40 cents, to be delivered monthly." Hall v. Chambersburg Woolen Co. (1898), 187 Pa. 18, 67 Am. St. 563. *See* Hughes' Conts., § 149.

1 Chit. Conts. 148, 1 Add. 222, 223, Aspdens' Estate (1853), 2 Wall. Jr. 368; 2 Whart. Ev. 957.

A. died in England and devised his possessions to his "heirs at law"; as there were several heirs, each sought to show that he was *the one;* but this was a patent ambiguity, not a latent.

Assumpsit for money had and received. S. had rented the "Adams House" of A., a tenement consisting of a hotel upon upper floors; the ground floor, excepting the entrance to the hotel, was stores Nos. 1-4; No. 5 was the "Adams House" entrance. Under a lease for years, S. claimed the whole edifice, the ground-floor shops, hotel—all. A. refused to give possession of the ground-floor stores, Nos. 1-4. S. had advanced rent, and for this sued. On the face of the lease there was no ambiguity; this only arose when its calls for premises were applied to the premises. Here is a latent ambiguity, and oral evidence is admissible to explain it. 1 Gr. Ev. 282, 297. *Falsa demonstratio*, etc., cited and applied, and held to apply in this case. *Held,* plaintiff could not recover.

Sargent v. Adams (1854), 3 Gray, 72, 63 Am. Dec. 718-724, n., 1 Gr. Ev. 282, 297, 3 *Id.* 103, 1 Chit. Conts. 149, 2 Whart. Ev. 943, 945. S. P., Griffiths v. Hardenberg (1869), 41 N. Y. 468; Blossom v. Griffin (1856), 13 N. Y. 468, 67 Am. Dec. 75-83, ext. n.; Bradley v. Washington, etc., Co. (1839), 13 Pet. 89; Bainbridge v. Wade, 20 L. J. (N. S.) Q. B. 7.

The figures "245" in the margin of a note, and a stamp for that amount, will not control the words "Two Hundred" in the body of a note. Words outweigh figures. Here is a patent ambiguity that cannot be aided by oral evidence. *Sanderson v. Piper* (1839), 5 Bing. N. C. 425 (15 E. C. L. R.), 2 Rul. Cas. n. 700-767: cases, Bro. Max. 607, 1 Beach, Conts. 742.

Latent ambiguity may be corrected by oral evidence. Ans. Conts. 248. *See* § 87, Hughes' Conts.

Ambiguity will defeat a plan of res adjudicata. Bro. Max. 187; 2 Gr. Ev. 27; Lea; Moore v. C.; *see* REPUGNANCY; ALTERNATIVE PLEADINGS; CERTAINTY.

No exposition against express words. *Quoties in verbis nulla est ambiguitas*, etc.; L.C. 51.

AMBULATORY: Pleadings faulty. L.C. 29. *See* ALTERNATIVE PLEADINGS; DENIALS.

Cannot be "fish, flesh or fowl." Kewaunee: 29 (certainty); Pain: 107. *See* DUPLICITY; ALTERNATIVE; *Posito*, etc.; ARGUMENTATIVE; And. Dic.; Bouv. Dic.

AMENDMENTS: When allowed. Bliss, Pl. 428-431; And. Dic.; Walden: 139; Codington v. Mott. Answers in Equity, Bouv. Dic.; Answer.

Amendments.—

After hearing not allowable. Allegans contraria; Falsus; MORALITY; REPUGNANCY. Sto. Pl. 401, 894, 895, 905 (answers); Williams v. Hingham Turnpike Co.: 6; Matteneci v. Whelan (1899), 123 Cal. 312, 69 Am. St. 60, n.; Horne v. Higgins; 11 Mews' E. C. L. 875-915; 67 L. R. A. 179-195 (indictment record after close of terms).

Due administration of justice considered before allowing. Walden; Wetmore, 205 U. S. 141. §§ 83-123 Gr. & Rud.; 16 Cyc. 338. Amendments changing parties, when not permissible. Fleming, 98 Me. 401.

Taxation proceedings. Cool. Tax. 534-543: 2 Desty, Tax. 115-118; P. v. Seymour: 256.

Of process and writs. Ald. Jud. Writs; Miller, 44 W. Va. 484, 67 Am. St. 777, n. (attachment may be amended by signing); Purcell, 1 Ire. Law (N. C.), 34, 35 Am. Dec. 734, n. (seal may be added).

Of records. Owen v. Weston; Balch v. Shaw (1851), 7 Cush. 282; Rood, Garn. 81; Bronson v. Schulten (1881), 104 U. S. 410; Gagnon, 193 U. S. 451 (limitations).

Disfavored pleas not allowable, e. g., the statute of limitations. Sub L.C. 293; Wood v. Chapman (1897), 24 Colo. 134. *Contra:* Illinois Steel Co. v. Budzisz (1900), 106 Wis. 499, 80 Am. St. 54, 48 L. R. A. 830.

Disfavored pleas cannot be brought forward by an amendment. Wood. *Unconscionable pleas cannot be amended.* See *Id.;* Bliss, Pl. 431.

Formal application for, must be made. Sto. Pl. 701, 894, 895, 902, 903; Wood, *supra.*

New cause of action cannot be introduced by. Kindel v. Lebert (1897), 23 Colo. 385, 58 Am. St. 234; L.C. 29; 84 Am. St. 53, n.; Smith v. Hodson. *See* CONSTRUCTIVE NOTICE.

Discretion; allowance of is; grounds for presumed until the contrary is shown. Illinois Steel Co., *supra.*

The amendment of pleadings to conform to the facts proven is authorized only when it does not substantially change the defense. Sawyer, 113 Iowa, 742, 86 Am. St. 411.

Limitation of amendments. L.C. 29; Hubler; Frost, 132 Cal. 421, 84 Am. St. 53 (cannot change the cause of action nor affect third persons). *See* CONSTRUCTIVE NOTICE. § 44, Hughes' Proc.

Amendment of complaint as new cause of action with respect to statute of limitations. Love v. R. R., 108 Tenn. 104, 55 L. R. A. 471, n.

Amendment filed after a cause is barred by limitations is not available against the defense under the statute unless a cause of action was stated in substance in the declaration filed within the period. In other words, the original pleading must be good in substance—sufficient after verdict—to save the cause from the bar; the amendments must only cure formal defects; omitted allegations of substance cannot be supplied. Doyle, 193 Ill. 501; Boyd, 116 Wis. 155, 96 Am. St. 948.

Amendments as to parties. L.C. 93; 99 Am. St. 414. Nor from *ex contractu* to *ex delicto. See* Bliss, Pl. 11, n. *After a trial.* Johnson, 68 N. H. 437, 73 Am. St. 610 (liberal rule); Adams v. Gill; Owen. *Nunc pro tunc of records.* 50 Mo. 405, 171 Mo. 68, 149 Mo. Ap. 1; 105 *Id.* 489; 31 *Id.* 525.

Indictments cannot be amended except as to formal parts. Bro. Max. 629. Owen.

Sheriff cannot amend his return after suit commenced to set aside the original case. *Sub* L.C. 51. Amendment of charters. *See* Cook, Corp.

Limitation of the right to amend is discoverable from the conserving principles. A very strict rule was applied in equity; and especially in regard to answers or pleas. 16 Cyc. 353-354. Generally after setting for trial no amendment was allowed and never of substance after evidence was introduced. This strict rule was for the repression of perjury. No opportunity for this or sham or false pleas was afforded. Walden. But latterly the view has come that the record is not so important as formerly viewed, and that it and all that relates to it is subject to legislative abolition or establishment, or to discretion. From these views the old strict rules are dissolved. Now, the right is wholly a matter of discretion. This is the logical result of loose definitions of variances, departures, waiver, and of the necessity for identification.

Judgment, *nunc pro tunc;* parol evidence sufficient for. Liddell, 78 Ark. 364, 115 Am. St. 42.

AMERICAN BOOK CO. v. KANSAS (1904), 133 U. S. 49.

Courts will not give opinions on moot questions or abstract questions of law. L.C. 270, 102; Bro. Max. 329, n. 342.

AM. PRINT WORKS v. LAWRENCE (1852), 23 N. J. L. 590, 57 Am. Dec. 420-434, Beach, Pub. Corp., Dill., Cool. Torts, Bish. C. L., 1 Suth. Dam. 3, 2 Wat. Tres. 670, 680; Cool. Const. Lim. 646, 739 (private property may be destroyed to arrest a conflagration); *Surocco v. Geary* (1853), 13 Cal. 69, 58 Am. Dec. 385-388, n., Pattee, Cas. Torts (excuse from performing an act of necessity); Cool. Const. Lim., 2 Wat. Tres.

Right of owner to compensation for property destroyed in abating a public nuisance. P. *ex rel.* Copcutt (1893), 140 N. Y. 1, 23 L. R. A. 481, n.; 26 L. R. A. 541; 1 Kinkead, Torts, 100.

Authority to burn an infected house cannot be conferred. There are limitations upon the power of government. Pritchard v. Board (1900), 126 N. C. 908, 78 Am. St. 679, n.; Taylor v. Porter: 219; Miller v. Horton; *Salus populi suprema lex;* Campbell v. Race (passengers may drive over adjoining lands when highway is impassable). *Necessitas inducit,* etc.

AM. STEAMSHIP CO. v. YOUNG (1879), 89 Pa. St. 186, 33 Am. Rep. 748-753; Greenh. Pub. Pol. 328, 2 Kent, 451, n. §§ 158, 186, Hughes' Proc.; 2 Page Conts. 810.

Extortion; offense of; elements; nature of. Leggatt v. Prideaux (1895), 16 Mont. 205, 50 Am. St. 498; Cobbey v. Burks (1880), 11 Neb. 157, 38 Am. Rep. 364, 365; Steele v. Williams, 8 Exch. 624;

Am. Steamship Co.—

S. v. Oden (1896), 10 Ind. App. 136, 9 Am. Cr. R. 295, n.

When money is paid under an illegal demand colore officii, the payment can never be voluntary. *See* COMPOUNDING OFFENCES: cases.

Intent is no element in oppression and extortion. *Actus non facit reum,* etc. There are exceptions to this maxim. P. v. Roby. *See* cases *supra;* 2 Bish. C. L. 390-408; 4 Crim. Def. 307-321. It is no defense to show that the party paying the fees agreed to pay them. Robinson v. Ezzel (1875), 72 N. C. 321. Such assent is not free and voluntary; it is in the eye of the law extorted by duress, which will avoid a contract.

Contracts for greater fees than the law allows are *In pari delicto,* etc. Greenh. Pub. Pol. 328. They are a species of duress; are affected with undue influence.

The supreme court of United States refused to review the above case (Young), 105 U. S. 41 (no federal question involved).

AMICUS CURIAE: May suggest jurisdictional questions. L.C. 2; Bouv. Dic.; 2 Cyc. 281-284. §§ 10, 11, Hughes' Proc.

ANALYSIS: Order of learning elements of contracts inconsequential. § 42*a*, Hughes' Conts. Law is an entirety. Preface, p. 5, and §§ 42, 46, 84, 111, Hughes' Conts. *See* ADJECTIVE AND SUBSTANTIVE LAW.

ANCIENT INSTRUMENTS PROVE themselves. 1 Gr. Ev. 570, 601; 1 Wh. Ev. 631; 2 Tay. Ev. 1643; Stark. Ev. 521; Davidson v. Morrison (1887), 86 Ky. 397, 9 Am. St. 295-304, n. (their admissibility); Marsh v. Collnet (1798), 2 Esp. 665, 666, 5 R. R. 763, 11 Rul. Cas. 508; 1 Ell. Ev. 421-433.

ANDREWS v. ANDREWS (1903), 188 U. S. 14-43. Stated and discussed in Haddock. Cited §§ 267, 268, Gr. & Rud.

The subject-matter of the judgment of a sister state may be inquired into by the courts of other states to see if it is of an enforceable character therein. Weltmer v. Bishop. The extraterritorial jurisdiction of courts is limited by fundamental principles from a prescriptive constitution.

Courts are limited by the law, also by their records. Haddock; Borden; Pennoyer; Windsor v. McVeigh; Campbell v. Greer: 2*a*.

A court is bound by its record. The study of procedure is a study of government. U. S. v. Cruikshank; Haddock.

Although a particular provision of the constitution may seemingly be applicable its controlling effect is limited by the essential nature of the powers of government reserved to the states when the constitution was adopted. *In pari materia.* Church v. U. S.

ANGLE v. C., M., & ST. P. & O. R. R. (1893), 151 U. S. 1-27, 3 Page Conts. 1330.

Trustees ex maleficio. One cannot acquire possession by means of fraud and retain it against party. *Nullus commodum,* etc. *See* COMMERCIAL PAPER. Fennemore, 3 Dall. (Pa.) 357 (1 L. ed. 634, n.), 1 Pom. Eq. 155; Benton, 2 Wend. 385. 20 Am. Dec. 623; Rice v. Manley (1876), 66 N. Y. 82, 23 Am. Rep. 30. *Sub* Swift.

ANGLE v. NORTH-WESTERN MUtual Ins. Co. (1875), 92 U. S. (2 Otto),

Angle.—

330, 2 Whart. Ev. 632, 3 Rand. Com. Paper, 1755, 1 Danl. Nego. Inst. 142, 2 id. 1396, 1411, 2 Pars. Conts. 844. *Cited,* § 149, Hughes' Conts.

Commercial paper; implied agency; alterations. Blanks left in commercial paper may be filled by any holder by implication of law. Angle Case. *Expressio eorum quæ tacite,* etc. One signing his name and delivering it to another, enables the holder to impose on a third person (Young v. Grote); and subscribing it to a skeleton agreement intensifies the argument against him. §§ 203, 209, Hughes' Proc.

Blanks may be filled in commercial paper by any holder. Fisher v. Dennis (1856), 6 Cal. 577, 65 Am. Dec. 534, n.; Weidman v. Symes (1899), 120 Mich. 657, 77 Am. St. 603: cases. Filling blanks in deeds. Hibblewhite v. McMorrine; *Nihil tam conveniens,* etc.; 8 Rul. Cas. 622-642, n. Friend.

The Angle Case agrees with the policy of construing commercial paper. L.C. 410; Lickbarrow v. Mason: 394: cases. "One is presumed to intend the natural, direct and probable consequences of his act." "Squib Case." This phase of negligence is often argued in contract law. Lickbarrow: 394.

ANIMALS: Killing of in self-defense. Aldrich v. Wright. Bees: Liability of owner for keeping. Earl v. Van Alstine (1850), 8 Barb. 630; 1 Thomp. Neg. Cas. 182-223, n.; Cool. Torts; Shear. & Redf., Whart., Neg.; Wood, Nuis.; 2 Wav. Tres. 862; Parsons v. Mauser (1903), 119 Iowa, 88, 93 N. W. 86, 97 Am. St. 283, 62 L. R. A. 132-136; May v. Burdett (monkey); Loomis v. Terry (dogs).

Injuries to and injuries by; property in; bailments of; brands; breeding; contagions and infections; cruelty to; driving away from range; estrays; herding on lands of another: 2 Cyc. 288-456.

Liability of owner for keeping ferocious. May v. Burdett. *See* Dogs. Bouv. Dic.; And. Dic.; Tiede, Pol. Power; Ingram on Animals.

For trespasses upon lands of another. Monroe v. Cannon (1900), 24 Mont. 316, 61 Pac. 863, 81 Am. St. 839-853, ext. n.

Cruelty to. 2 McClain, C. L. 1161-1164; malicious injuries to, *id.* 815.

ANNICULUS TRECENTESIMO SEXAgesimo-quinto die dicitur, incipiente plane non exacto die, quia annum civiliter non ad momenta temporum sed ad dies numeramur: We call a child a year old on the three hundred and sixty-fifth day, when the day is fairly begun, but not ended, because we calculate the civil year not by moments but by days. Dig. 16, 50, 132, 134; Calvinus, Lex. (majority of children). *See* INFANTS.

ANNUITIES: 2 Cyc. 458-472.

ANOTHER ACTION PENDING: 1 Bouv. Dic. 197; Former action pending; *Auter,* etc., 2 Am. & Eng. Eq. Cas. 195-202; L.C. 33; 1 Cyc. 21-47.

ANSLEY v. BANK OF PIEDMONT (1896), 113 Ala. 467, 59 Am. St. 122. *Cited,* 48 L. R. A. 177. A plea of recoupment admits the contract. Dickson v. Cole: 34. *See* TENDER. *Allegans; Posito;* DUPLICITY.

ANSWERS: Form of. Bowlus v. Phœnix Ins. Co.; 2 Fos. Fed. Prac. 1307.
Must be certain and sufficient. J'Anson: 91; Skeate: 82; Bliss, Pl. 4, 138, 141, 142, 351, 417*a*; Green: 90; Maxw. Code Pl. 389. *Ambiguum placitum,* etc.; *Ambigua responsio.* § 39, Hughes' Proc.
Waiver of. See Munday: 79; J'Anson: 91.
Fraud must be pleaded in, as in a complaint: J'Anson; Bliss Code Pl. 329*n*; Frisbee, 11 Wis. 393; Bliss, Pl. 329: cases. Demurrer searches the whole record. Bliss, Code Pl. 417*a*.
Too narrow, must not be; must be sufficient as to all which it assumes to answer. Walker, 150 Ind. 317, 324; Emshwiler, 21 Ind. App. 347, 69 Am. St. 360; Maxw. Code Pl. 400.
Defenses not pleaded are waived. Cromwell: 26; Kirven; Bliss, Code Pl. 329*n*, 345. *See* DEFENSES; ALLEGATIONS. Frisbee v. Langworthy, *supra.*
Manner of stating several defenses. Bliss, Code Pl. 346; Bell v. Brown.
Anticipating a defense, unnecessary. 1 Chit. Pl. 222 (12th Am. ed.); Bliss, Pl. 200; L.C. 264; Cobbey, Replevin, 778.
More than enough is surplusage. Little Nestucca R. Co., 31 Or. 1, 65 Am. St. 803; Bliss, Pl. 200.
Admissions in. See ADMISSIONS; DENIALS. L.C. 34-44.
Generally: Bouv. Dic., And Dic.
ANTICIPATORY BREACH: *See* ABANDONMENT; Frost: 308*a*; Hochster: 308*b*. Gives immediate right to sue. Frost: cases.
APPEAL BONDS: Cannot be waived. Brown v. Chicago, etc., Co. (1898), 10 So. Dak. 633, 66 Am. St. 730; Hall v. Payrock Mining Co. (1881), 6 Colo. 81 (this shows there is one thing in Colorado that cannot be waived). *See* Hume v. Robinson. *Contra:* 1 Encyc. Pl. & Pr. 100, 384-406; Virginia, etc., Co. v. New York, etc., Co. (1893), 95 Va. 515, 40 L. R. A. 237 (objection to must be prompt). 2 Cyc. 916-965.
Liability of surety on. Babcock v. Carter (1897), 117 Ala. 575, 67 Am. St. 193-204*n*. *See* And. Dic.; APPELLATE PROCEDURE.
APPEALS: Jurisdiction is divested by an appeal. P. v. Mayne (1897), 118 Cal. 517, 62 Am. St. 256*n*. This is a very old rule. Chs. 25, 26, Acts of the Apostles. And. Dic. *See* APPEAL AND ERROR. 2 Cyc. 474-1093.
Confer no jurisdiction when trial court had none. Audi alteram partem. L.C. 85.
Appeals. Dead issues will not be decided. L.C. 268.
Accepting any benefit under a judgment waives the right to an appeal. Fiedler v. Howard (1898), 99 Wis. 388, 67 Am. St. 865*n*. *See* APPROBATE and REPROBATE; *Allegans contraria,* etc.
Consent decrees cannot be appealed from. Bigley v. Watson (1897), 98 Tenn. 353, 38 L. R. A. 679: cases.
APPEARANCE: Waives summons, process. *See* ABATEMENT; L.C. 63. Pennoyer v. Neff: 58; Cooper v. Reynolds; Toy v. Haskell (1900), 128 Cal. 558, 61 Pac. 89, 79 Am. St. 20: cases. *See* also White v. Wagar; Bouv. Dic. For one purpose is not for all. *See* Drake, Attach. 101; ABATEMENT. Essential at common law. L.C. 63.
Jurisdiction of the person; how acquired. L.C. 58. Attachments; nature of. L.C. 58.
Of attorney presumed regular. Harshey v. Blackmarr.

Appearance.—
In rem proceedings. L.C. 58.
Appearance of attorney may be shown a forgery. Ferguson v. Crawford: 264.
Parties may agree for. *See* STIPULATIONS; *Cognovit;* French v. Miller.
General appearance waives process. See ABATEMENT; L.C. 299: cases. *Audi alteram partem.*

APPELLATE PROCEDURE *involves the ways and means of the chief thing created in constitutions, namely, "a court of appellate jurisdiction only."* No words of organic law are more pregnant or meaningful. For these courts *ad quem* (to which a record is removed) there are tremendous implications. The court from which the record is removed is called the court *a quo.* The importance of appellate courts is not made sufficiently prominent. They should be viewed from what is observed of them in The Federalist, in *Marbury v. Madison* and in *Hunter v. Martins.* They are the first and chief thing in a constitutionalism; upon them all other matters depend. All depends on *stare decisis.* From this requirement appellate courts should be viewed.

The means of operating "courts of appellate jurisdiction only" is nothing less than a prescriptive constitution. The incidents are a mass of complex rules and requirements which are called appellate procedure, which may be classed as one of the conserving principles. With all of procedure all of the operations of a constitutionalism interweave or interlace. From this fabric it appears that the study of procedure is a study of government.[1] For the requirement of these courts all other laws yield.[2] For them all necessary and incidental powers and matters are conceded.[3] Accordingly tremendous implications are annexed.

Courts are bound by their records in a constitutionalism, and review courts are most strictly so, else they could usurp the powers of a court *a quo* and pass originally on matters not first viewed and passed upon by it. This would be usurpation or abuse of power; it would be a means of a judicial tyranny and oppression of the most insidious and destructive nature. Protection against such wrongs depends upon a

1—U. S. v., Cruikshank: 232; Blake.
2—*In præsentia majoris.*
3—S. v. Townley: 225*a*: cases; *Expressio eorum.* Hughes' Proc., §§ 203-209.

Appellate Procedure.— record which is constituted and presented agreeably to the rules of procedure, which has several chief conserving policies that should be considered in this connection.

Again to impress it is repeated, that the study of procedure is a study of government which imperatively requires a record in all its operations and great respect for that first and basic rule of both evidence and pleading, namely, "what ought to be of record must be proved by record and by the right record." Planing Mill Co., 2*d*. Here should be considered the rules of certainty in pleading, and the very important ones, namely, *allegata et probata* must correspond, a court is bound by its record, departures and variances are intolerable in a constitutionalism (Huntsman: 231); pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it; also the doctrine of AIDER, and WAIVER.

The least restrained and the most fluctuating agencies of government are its highest courts. They are only within the law when they are acting upon the matter confined or entrusted to them by the general law and further in accordance with rules of procedure; otherwise they are the most destructive force of a constitutionalism and the advance agents of absolute power under the guise of respect for constitutional duty. This view is afforded in those states where records are waived and dispensed with; the discussions of constructive contempts and of the liberty of speech and of the press reflect many corroborations of the above propositions, also of this leading one, that whether there is stable and protecting law depends upon the arbitrament of high courts.[4] Upon them depends the public welfare, protection and the usefulness and perpetuity of government. They can withhold and refuse the operation of a constitutionalism.

The exercise of the high powers of an appellate court depends upon a record. More than the mandatory record is required by the federal supreme court in reviewing the judgment from the highest court of the state. Whatever defects may be shown from the mandatory record

4—Lange: 159.

Appellate Procedure.— that court makes the right to have it reviewed depend upon objections and exceptions taken and reserved.[5] The practice in that class of cases is anomalous and imposes conditions which often seem so unreasonable as to be impossible; for instance, if a matter is presented to the state court out of which *res adjudicata* could not possibly arise and that court was at the end of the litigation to declare and vindicate the contrary.[6] Giving to state courts absolute immunity to declare and deal with estoppels is a surrender of much that supports protection under the guaranty of "due process of law," which can be emasculated of all protective force by no greater instrument than the doctrine of estoppel.[7] How a federal question is raised and presented is a leading question and should be considered by every practitioner.

In cases that originate in the federal system the mandatory record is respected without reference to the statutory record.[8]

In appellate procedure two kinds of juridical matter have great attention and are the burden of thousands of cases. These are, namely, the matter of the mandatory record and the matter of the statutory record, or in other words, what can be waived and what cannot be waived; or matter of substance and exception matter.

There are four documents that must be most familiar to every practitioner, namely, the mandatory record, the statutory record, the assignment of errors and the argument and brief. The greatest of these is the mandatory record, which forever carries with it rules that relate to the general demurrer, the motion in arrest of judgment, collateral attack and *res adjudicata*, in short of the *coram judice* proceeding. These rules in relation to that record greatly modify and influence requirements and rules relating to the statutory record, the assignment of errors and the written brief. *E. g.* if there is no *placitum* or statement of the cause of action, or material

5—Winona Land Co. v. S.; Windsor: 1.
6—Breeze; Rensberger; Howard v. Fleming. *Præsentia corporis.*
7—Kirven.
8—Windsor: 1; U. S. v. Cruikshank; Hanford: 86.

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allegation, or admission, or denial, or issue then there appear grave jurisdictional defects, and such as constitute the proceedings *coram non judice*. Any way in which such a proceeding is called to the attention of a constitutional court respectful of its duties and highest of obligations will be available. With such a proceeding manifest from the mandatory record, the rules and requirements of the statutory record and the assignment of errors have little if anything to do. The nullity, the void proceeding, need not be objected to.[9] As such a proceeding is tested upon collateral attack so it should be in appellate procedure. The greatest latitude should be given to object to the *coram non judice* proceeding; it is not satisfactory to say this is greater at subsequent stages and upon collateral attack than in appellate procedure.

The matter of the statutory record is governed by wholly different considerations. This is abatement or dilatory or waivable matter in almost all cases. This to be available depends upon the assignment of errors, and further, these must be sufficiently noticed in argument to show they are not abandoned or condoned. Waivable matter will be pushed aside and overlooked if possible. Therefore objections, exceptions, motions for new trial and further exceptions in some courts must be reserved to entering judgment on the verdict, and still further, all not specifically renewed in argument will be held waived. Some decisions are unreasonably technical, indeed they are absurd as to exceptions. These should be known. These requirements present the basis of that conserving principle of procedure which is, that it is the policy of courts to speed a cause to final disposition upon its merits and to disregard formal or waivable objections. This is a conserving principle. Merits and substance are sought and favored, but many forms and ceremonies are held waived if consistent with the record. Whether or not the forms of the law are a part of the law depends on the intelligence and skill of him who attempts to secure a review of formal matter. Courts will enforce the

9—Windsor: 1; Slacum.

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forms of the law if properly applied to, and before justice between the parties to the record is considered, as multitudes of cases show.[10] Many are the cases where the guilty have escaped upon technicalities, as where a plea of not guilty was not shown from the right record;[11] or where the proceedings were *coram non judice*.[12]

In enforcing the forms of the law hard cases must arise as they always have. They cannot be avoided. The forms of the law are ceremonies upon which matter of substance depends.

It is due to confess that much is written opposed to the above propositions. A provision is founded in codes that all must give way and all be subservient to "*justice between the parties.*"[13] Books prepared for beginners countenance this view.[14] But it is a mistaken one, for we are also told that if counsel are indecorous their clients will suffer from offended judges. This last statement indicates that courts are easily swerved from doing justice between the parties after all. On principle both of these propositions ought not to be true. A more defensible one is, that a court that has no respect for the forms of the law is a poor servitor of justice; they do not for they cannot serve it well. In every constitutionalism these three basic rules must be respected, namely, the constitutional rule requiring the right record already quoted; that every presumption is against a pleader, and that a court is bound by its record. These three rules may be called the constitutional, the mystic and the *coram judice* rules by way of brief distinction and to impress them. They mold and influence appellate procedure throughout. They involve this leading rule of evidence and of pleading, namely, what is not juridically presented cannot be judicially considered.[15] That court that attempts to build up a jurisprudence in disregarding the foregoing prin-

10—Windsor: 1; Austin R. R.; Planing Mill Co.; U. S. v. Cruikshank: 232; Munday: 79; Hahl v. Sugo.
11—Crain v. U. S.
12—Milligan's Case; Haddock.
13—*See* CODES.
14—Brief Making, pp. 26, 27, quoting Judge Dillon.
15—*De non apparentibus; Expressio unius. See* ABATEMENT.

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ciples is sure to bring upon those who appeal to it great disappointments. Its decisions will distort and pervert all certainty, stability and congruity. In this connection it is needless to point to examples. It is enough merely to recognize the existence of such errorists, such teaching and such jurisdictions. Some of these show they do not understand the origin, history and uses of the statutory record, and of course in many cases this involves all parts of the record.

Upon clear perceptions of the functions of these records depends a right understanding of fundamental and underlying rules of evidence, of pleading, of practice, also of construction. These rules cannot be rightly comprehended without a proper elucidation and definition of those records. Works on those subjects omitting such basic requirements cannot rightly lay claim to be the best possible expositions thereof. By such shortcomings they should be judged. The consequences of such grave omissions should be known.

The assignment of errors (q. v.) is an important adjunct and especially of the statutory record.[16] It must be precise and certain and generally include the points in the motion for a new trial with additions that the court erred in overruling the motion and in entering judgment. It must be argued else it is waived. Atlantic; L.C. 296. The latter are not required in all states. Generally from the mandatory record, the statutory record and the assignment of errors the argument or brief is conceived. Affecting these matters are rules of court, statutes and decisions which must be considered.

Important maxims in appellate procedure are those already mentioned, also, *Omnia præsumuntur rite, etc., Audi alteram partem, Quod ab initio non valet in tractu temporis non convalescet* and *Debile fundamentum fallit opus.*

Review courts may order proper judgments entered where the facts are properly established and there is no judgment or discretion involved which could have been exercised by the court *a quo.*[17]

16—§ 53; Atlantic.

17—McAfee; Reynolds; Ruffner, 59 W. Va. 432, 115 Am. St. 924; North Carolina, 137 N. C. 1, 115 Am. St. 636.

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In appellate procedure jurisdiction is a leading question. It profoundly involves constitutional law.[18]

Argument. The right to begin or to open and close the case is indicated from the record, and follows the rule of the burden of proof. Actore non probante reus absolvitur; Semper præsumitur pro negante; Bonnell:185; *see* ORDER OF PROOF.

Is bounded and confined by the record. It gives the right as the power of attorney gives the agent authority to make the deed. Matter of argument and surplusage will not enlarge that record. *Frustra probatur quod probatum non relevat.*

Abuse of right of argument is material error and is ground of reversal. Brown v. Swineford: Cases; 1 Am. Crim. Rep. 115; see Week's Attys. 225-241. It may be defamation and actionable. Hastings v. Lusk.

Errors assigned must be argued else they are waived in some courts. *See* APPELLATE PROCEDURE; ASSIGNMENT OF ERRORS; *Consensus tollit errorem;* Atlantic R. R.

Here it may be well to observe, that objections to waivable matter must be apt, precise, specific and certain, and likewise excepted to and not afterward abandoned, as by failing to argue the assignment. Atlantic. Some courts hold it must be further raised in a motion for a new trial, and exception to overruling this, and still further, an exception must be reserved to entering judgment after the motion for a new trial is overruled. This is vain and fruitless, but it illustrates the policy of disposing of waivable or dilatory matter which is a conserving principle of procedure. This policy is led by strict and technical construction, still it should be limited by reason. Absurdities are not the law.

Brief Making. It seems well to ob-

18—Marbury: 142.

Nature and form of remedy by appeal. *See* Appeal; Requisites of Appeal; Decisions reviewable; Right of Review: Presentation and reservation in lower court of grounds of review (*see* EXCEPTIONS) (Error); (Motion for new trial); Parties and transfer of causes for review; Supersedeas or stay of proceedings; Liability on appeal bonds; Effect of transfer of causes; Assignment of errors. 2 Cyc. 474-1093. *See* CONVENIENCE. § 53, Gr. & Rud.

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serve that an important part of presenting every case is the law of argument relating thereto. In appellate courts much of the argument is relegated to the brief, or in other words, the written argument. The preparation of this is largely governed by rules of court. The formal dress of the brief is almost wholly regulated by rules of court, which generally require the caption of the case. This includes the number of the case, the venue and title of the court, the names of the parties plaintiff and defendant, the name of the annexed document and the names of counsel. Then follows a statement of the case, somewhat after the manner of opinions in official reports, and likewise the case is argued. Generally each proposition, also each authority cited, is paragraphical. Authorities are cited by title, volume and page. Text books are cited by title page and the edition where this is necessary; it is not necessary in citing Story's or Greenleaf's works, as these are in sections, which have never been changed. In the sixteenth edition of the latter are singular alterations which may sometimes be noted. When Broom's Maxims are cited it may be well to cite the maxim or enough thereof to lead to it, as some of the editions have different paging. In the eleventh edition of Smith's Leading Cases great alterations are made both in paging and matter. In some, many cases are omitted. The ninth American was most carelessly prepared. Several cases reprinted are omitted in the table of reported cases, which appears at the end of the third volume. The eighth edition has all the cases, also a table of cases cited. The title of the case should be cited in this work, then it is easily found from the table of cases.

Works that have two tables of cases cited, one the English and another the American, or one the author's and another the editor's, are not most convenient for ready reference. More important are the questions: should maxims or old or late cases, or English or federal or state cases be cited? These may be variously answered. No doubt to some propositions or in some courts it may be well to employ one or the

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other, or all, *e. g.*, if the buyer inspected for himself and chose on his own judgment and took no warranty, this proposition is well briefed by adding, *Caveat emptor.* If more is desired, then volumes are added by citing *Chandelor v. Lopus, Pasley v. Freeman* in *Smith's Leading Cases.* For some it may be well to add, these are widely reprinted and cited cases (see Hughes' Procedure). If the old and best known American case is desired then add *Laidlaw v. Organ* (1817), 2 Wheat. 178 (a widely cited case). If the late cases are desired, see these gathered along with the citations of old cases. From these, an infinitude can be gathered. No one volume would contain all of them.

To illustrate a short plan, consider this one: Suppose the question was, who is a *bona fide* purchaser of commercial paper? If to this question is added the next dozen words:

Swift v. Tyson (U. S.), a widely reprinted and cited case. See Text-Index this work. Now, what have we done? Or, if of real estate thus:

Le Neve: 396 (White & Tudor's Lead. Eq. Cas.), a widely reprinted and cited case in equity works. See Text-Index.

In some quarters the question is, should there be cited at all the *Chandelor, Pasley, Laidlaw, Swift* and *Le Neve* cases, they being old cases? Another is, to what extent should local and late cases be added if the case is in the federal courts? Suppose it is in the state courts, what is the wisest course? Where should the maxim be cited, if at all?

Recently a work was presented the profession upon the subject of brief making, which wholly failed to present the basic principles of procedure. This work of brief making referred to warns against citing text books. Now, what text book will mislead any more than opinions of courts as to any of the above propositions? Is it not quite as safe to cite text books as cases from states that are of the most conflicting and bewildering character, *e. g.*, states in which pleadings are waived, or in which a proceeding will be held *coram judice* in one relation but *coram non judice* in another, or in states with hundreds of volumes of

Appellate Procedure.— reports where it cannot be determined whether a plea of *res adjudicata* must be pleaded, nor how; whether it may be done by conclusions of law, or whether the record must be set forth for comparison; nor how and when this plea shall be interposed and considered? (Kirven.)

It is due to say, that not only are the states very unlike as to these questions, but further and worse yet, in several jurisdictions their own sets of books are worse than useless to consult. See Preface: DATUM POSTS. Text books may be worthless, but then so are many sets of reports. Jejune and garbled, inconsistent and incoherent matter has to be dealt with on every hand and from all sources by the brief maker. Justification for this observation will appear from the least investigation or observation.

The books on procedure, evidence, pleading and practice, and the various branches of trials, trial tactics, legal tactics and practice under the revised code and statutes which omit the maxims of jurisprudence upon which procedure is founded can not long pass as serious performances. And worse yet are the books that expressly denounce the maxims. See Preface, DATUM POSTS, also GROUNDS AND RUDIMENTS. The law has no more imperial mandate or greater guarantee than is to be found in *Verba fortius accipiuntur contra proferentem* and its cognates.

When one is led to the maxim or leading case on the subject he is considering generally his work is more than half done, e. g., examine tables of cases cited, or citations to the reports of the various jurisdictions. The foregoing cases along with M'Culloch: 147, Marbury: 142, Cumber: 311, Cutter: 308, Coggs: 350, Scott v. Shepherd (Squib Case) and *M'Naghten's Case:* 195 may be tested.

For locating principles from tables of cases cited and either to text books or sets of reports the old notable and widely cited cases are the best for reasons that will suggest themselves. And their titles should ever be cited, *e. g.*, if Smith's Leading Cases are cited, the title of the case under which the matter referred to is found should be cited. Then it is easily located from the table of cases except when cases have

Appellate Procedure.— been omitted in garbled editions referred to, and in the careless omission of cases from the tables as is found in the ninth American edition.

Generally: 2 Hughes' Proc. 431-437; 2 Cyc. 474-1093.

The means of, is a conserving principle. §§ 87, 216, Gr. & Rud.

APPLICATION OF PAYMENTS: Field v. Holland, L.C. 387: cases; Bouv. Dic. 1 *id.* 996 (imputation of payments).

APPORTIONMENT: Bouv. Dic. Of contracts can not be, by one's own fault. Cutter v. Powell, L.C. 308. *See* EVICTION.

APPRENTICES: 3 Cyc. 542-564.

APPROPRIATION OF PAYMENTS: *See* APPLICATION OF PAYMENTS. L.C. 387.

APPURTENANCES: What are. Scott v. Moore (1900), 98 Va. 668, 81 Am. St. 749-771, ext. n.; Sherrick v. Cotter (1902), 28 Wash. 25, 92 Am. St. 821, n.; Clapp v. Wilder (1900), 176 Mass. 332, 50 L. R. A. 120, n.; 2 Warv. Vend. 541-558; § 147, Hughes' Conts.

How far grant of mill includes water rights. Cox v. Howell (1901), 108 Tenn. 130, 58 L. R. A. 485, n.; *Cuicunque aliquis quid*, etc.

AQUA CURRIT ET DEBET CURRERE ut currere solebat: Water runs and ought to run as it has used to run, or water runs naturally and should be permitted thus to run, so that all through whose land it runs may enjoy the privilege of using it. 2 Kink. Torts, 668, 669; 3 Rawle (Penn.), 84, 88; 26 Pa. St. 413; 3 Kent, 439; Gale & W. Easem. 182; Ang. Watc. 93, 108*e*, 413; Gould, Wat.; Farnham, Wat. *Cited*, § 326, Hughes' Proc.

Water rights: Chasemore v. Richards; Acton v. Blundell; Arkright v. Gell; Mason v. Hill (1833), 5 Barn. & Adol. 1 (27 E. C. L. R.), 2 N. & M. 747, 39 R. R. 354, Blanch. & Week's Lead. Cas. Mines, 697-725, ext. n. (a widely cited and approved case); Webb v. Portland Co., *sub* Ashby v. White; Davis v. Getchell (1862), 50 Me. 602, 79 Am. Dec. 636-645, ext. n.; Hughes' Proc. 437.

ARBITRATIONS: 5 Cyc. 581-810; See AWARDS.

ARGUMENTATIVE PLEADINGS faulty. Pain: 107; Bliss, Code Pl. 316; L.C. 30; Robinson v. Raley: 45; L. C. 184. Opposed to certainty. U. S. v. Cruikshank: 232. *See* AMBIGUOUS; AMBULATORY; ALTERNATIVE; CERTAINTY. Argumentative pleadings are not calculated best to support the conserving policies of procedure.

ARGUMENT OF COUNSEL: Must be within the record. Brown v. Swineford: 161; 11 Am. Crim. Rep. 115. *See* Weeks, Attys. 225-241; 12 Cyc. 568-585. Defamation by counsel; when actionable. Hastings v. Lusk: 180. Order of argument follows burden of proof. *See* RIGHT TO BEGIN. Bonnell v. Wilder: 185. Errors must be argued, else they are waived. *See* ASSIGNMENT OF ERRORS; *Consensus tollit errorem.* Atlantic. APPELLATE PROCEDURE; § 53, Gr. & Rud. (Convenience).

ARGUMENTUM AB INCONVENIENTI est validum in lege; quia lex non permittit aliquod inconveniens: An argument drawn from what is inconvenient

Argumentum.—
is good in law, because the law will not permit any inconvenience. Bro. Max. 184-187; these cases illustrate the maxim. M'Culloch v. Maryland; Outram v. Morewood; Cromwell v. County of Sac; Humphreys v. McCall; Wonderly v. Lafayette County.

Recognition of first introducing a plaintiff's cause by an answer or a reply is denied by the supreme court of the United States, which will only look at the due process of law record and to the initial pleading. Sto. Pl. 10; Campbell v. Porter: 2. From these facts important deductions can be made. For a statement of the controversy upon questions of review in that court, see REPLY; Boyd v. Blankman, L.C. 62; *Quod ab initio*, etc. Cited, § 26, Hughes' Proc. §§ 53, 116, Gr. & Rud.

The following will also illustrate the usefulness of the above maxim: Codes provide that the statement shall contain facts sufficient to constitute a cause of action, also that filing an answer will not waive this requirement, also that all relief shall be within the facts stated. From these provisions it is deducible that there must be pleadings, also that these cannot be waived, for it is expressly provided that filing an answer will not waive them, therefore their absence may be objected to afterward, and along with the provision that the court must have jurisdiction of the subject-matter. *See* ALLEGATIONS; CAUSE OF ACTION; also that all relief must be within the pleadings and not without the allegations or the denials. In other words, a judgment without a foundation is a nullity, is *coram non judice*, a mere *dicta* or *brutem fulmen*. These conclusions are deduced from the express code provisions agreeable to *Argumentum*, etc.

ARKRIGHT v. GELL (1829), 5 M. & W. 203, 2 H. & W. 17, Blanch. & Week's L. C. Mines & Min. 816, 15 Mor. Min. Rep. 162, 10 Rul. Cas. 219, Wood, Nuis., Moak, Underh. Torts, 3 Kent, 439, Whart. Neg., 1 Add. Torts, 179, 163, Ang. Wat.: *Aqua currit*, etc. *Cited* § 326, Hughes' Proc.

Artificial Watercourses; rights and liabilities of. Arkright; Atchison v. Peterson. Prescriptive right to flow water in, may be gained by twenty years' user; and such right is the same as that to flowage in a natural stream. 3 Kent, 439*n*, Bigl. Lead. Cas. Torts, 520*n*.

ARMORY v. DELAMIRE. L.C. 180.

ARMOUR PACKING CO. v. LACY (1905), 200 U. S. 226-238.

Construction of state statute by its courts is conclusive upon federal courts. *See* Pabst; Terre Haute R. R. v. Indiana; Howard v. Fleming; Howard v. Kentucky.

ARMY AND NAVY: 3 Cyc. 818-865.

ARRAIGNMENT AND PLEA: The mandatory record must show. Munday v. Vail, L.C. 79: cases; Bouv. Dic.; And. Dic.; Crain v. U. S.; Aylesworth.

ARREST: See also Allen v. Wright, L.C. 167.

With and without warrant. Allen v. Wright; S. v. Lewis (1896), 50 O. St. 179, 9 Am. Crim. Rep. 49: notes.

Felony; fugitive from another state may be arrested as if a domestic felon. S. v. Taylor (1896), 70 Vt. 1, 67 Am. St. 647, n., 42 L. R. A. 673, ext. n. (officer must disclose his authority); *John Bad Elk v. U. S.* (1900), 177 U. S. 529 (warrant essential; absence of it a defense for killing). Must be obtained as soon as possible. *Leger v. Warren* (1900), 62 O. St. 500, 78 Am. St. 738, 57 L. R. A. 193-225, ext. n., 1 Kinkead, Torts, 212-235; *Fox v. Gaunt* (1832), 3 B. & Ad. 798 (23 E. C. L. R.). Ames' Cas. Torts, 220, Ball, Cas. Torts, 431; Bigl. L. C. Torts, 250; Bouv. Dic.; Bish. Cr. Proc. 167, 169; 177 U. S. 535 (warrant essential to arrest for a misdemeanor); R. v. Chapman, 12 Cox C. C. 4; *Rafferty v. P.*, 69 Ill. 111, 18 Am. Rep. 601; Cool. Torts, 196-223; 1 Kinkead, Torts, 212-255 (arrest; personal liberty; false imprisonment; restraint of person; malicious abuse of process).

Breach of the peace; right to arrest to prevent is given citizen and officer alike. Timothy v. Simpson (1835), 1 Cromp. M. & R. (Eng.) 757, 5 Tyr. 244, 6 C. & P. 499 (E. C. L. R.), 40 R. R. 722; Ball, Cas. Torts, 438, Bigl. Lead. Cas. Torts, 257, ext. n., Ames, Cas. Torts, 211, 1 Wat. Tres. 315, *q. v.* 1 Bish. Crim. Proc. 155-218; *Ledwith v. Catchpole*, Bigl. Lead. Cas. Torts; Tiede, Pol. Power; Bouv. Dic.; McClain, C. L.

For a felony actually committed the citizen and officer may each arrest alike; but the officer only can arrest upon suspicion that a felony was committed. Suspicion is no defense for a citizen unless the felony was committed. Whenever a warrant is essential it seems that an officer is also. Necessity for a warrant excludes the right of the citizen.

Officers cannot arrest to search for concealed arms. Pickett v. S. (1896), 99 Ga. 12, 59 Am. St. 226, n. *See* SEARCH; *Salus populi*, etc. Semayne's Case.

Right to kill in arresting; cannot for a misdemeanor. Brown v. Weaver (1898), 76 Miss. 7, 71 Am. St. 512, n.: cases. *See* John B. E., 102 Am. St. 274. S. v. Smith (1904), — Ia. —, 70 L. R. A. 246: cases.

Right to resist unlawful arrest. Sub Allen v. Wright; John B. E.; Witherspocn v. S., 42 Tex. Cr. R. 532, 61 S. W. 396, 96 Am. St. 812, n. (void warrant); Rafferty.

Conclusion of law in a warrant, like "Complaint on oath having been made before me that the offense of threatening breach of the peace has been committed," does not state a crime, is not a sufficient peace warrant and is void, and it may be resisted. L.C. 166.

Arrest on Sunday. L.C. 174; *Dies non.* Are guarded by the mandatory record. *Allen v. Wright; Tarble's Case;* 177 U. S. 535: cases.

Officer cannot arrest and take money from the person. Hubbard v. Garner (1897), 15 Mich. 406, 69 Am. St. 580; L. C. 90; *Salus populi*, etc.

Constitutions in some states provide that no search or seizure of property or person shall be made, except on warrant describing, and this upon oath in a writ-

Arrest.—

ten complaint. *See* ILLINOIS; COLORADO. Statutes regulate. John B. E. Case, 177 U. S. 529; L.C. 130.

The right of policemen to arrest and of citizens to resist. S. v. Evans (1901), 161 Mo. 95, 84 Am. St. 669-703, ext. n. Police; power; justification of one aiding. Martin, 141 N. C. 317, 7 L. R. A. (N. S.) 576.

Searches and seizures of papers and documents. S. v. Slamore (1901), 73 Vt. 212, 87 Am. St. 711, n.; Adams v. N. Y.

Liability of an officer for making an arrest. Leger v. Warren.

Privileged persons. Dunlap: 108.

Void warrant; liability for arrests under. Oates, 136 Ala. 537, 33 So. 835, 96 Am. St. 38 (one is liable for suing out); L.C. 166.

Officer may stop a train to arrest. Brunswick R. R. v. Pander (1903), 117 Ga. 63, 97 Am. St. 152, n.; St. Johnsbury R. R. v. Hunt, 60 Vt. 588, 6 Am. St. 138, 38 Am. & Eng. R. R. Cas. 307; U. S. v. Kirby.

Generally: 3 Cyc. 873-980; Allen v. W., L. C. 167; Semayne's Case.

ARREST OF JUDGMENT: Bouv. Dic.; L.C. 12; 2 Gr. Ev. 69-81; 2 Bish. Cr. Proc. 31-54; 3 *id.* 51-57; Rushton v. Aspinall: 5; Cooke v. Oxley: 321; McAllister v. Kuhn: 3.

Practice relating to. Harris v. S.: 158. *See* COLLATERAL ATTACK; Windsor v. McVeigh: 1; Campbell v. Porter: 2.

ARSON: 1 McClain, C. L. 517-531; 2 Bish. Cr. Proc. 31-51; 3 Gr. Ev. 51-57; 3 Cyc. 984-1010; Bouv. Dic.; And. Dic.; Carter v. S. (1899), 106 Ga. 372, 71 Am. St. 262, n.; 101 Am. St. 21-28.

ARTICLES OF THE PEACE. Bouv. Dic.

ASHBY v. WHITE. *Ubi jus.* L.C. 273.

ASH v. ABDY (1678), 3 Swanst. 664; Smith, Conts. 74, 75. *Cited,* § 145, Hughes' Conts. History of statute of frauds.

ASLIN v. PARKIN (1759), 2 Burr. 665, 2 Lord Kenyon, 376, Sm. Lead. Cas. 826-837, 3 Pars. Conts. 237, 3 Suth. Dam. 992, 993; Tyler, Eject., Sedgk. & Wait, Tri. Tit. Land, 2 Gr. Ev. 333, 1 Herm. Estop., Bigl. Estop.; notes to Kingston's Case: 2 Smith. Lead. Cas.; 3 Sedg. Dam. 912-920. §§ 120, 137, Hughes' Proc.

Ejectment; Res adjudicata. All is presumed heard and tried that could be heard. But in ejectment the possession is only involved, and this is the limit of the bar. Sedgk. & Wait's Tri. Tit. Land, 505-545. What title will support an ejectment suit. Hancock v. McAvoy (1892), 151 Pa. 439, 18 L. R. A. 781-792, ext. n.

General denial in an ejectment suit is sufficient to admit all evidence and titles which may tend to defeat plaintiff. Sparrow v. Rhodes (1888), 76 Cal. 208, 9 Am. St. 197, n. Conclusions of law and general denials are tolerated in ejectment, and also in replevin. Real actions. 2 Gr. Ev. 547-559; Bell v. Brown (code). Generally: 2 Gr. Ev. 303-337, 3 Suth. Dam. 902-1000, 3 Sedgk. Dam. 898-952.

ASPDEN'S ESTATE. *See* AMBIGUITY; RES ADJUDICATA. Cited, §§ 223, 224, Hughes' Proc.

ASSAULT AND BATTERY: Stephens v. Myers; Piper v. Pearson: 114; 1 McClain, C. L. 230-253; 2 Gr. Ev. 82-100; 3 *id.* 58-65; 2 Bish. Cr. Proc. 50-70*a*; 1 Wat. Tres. 142-292; Cool. Torts, 184-195; 5 Crim. Def. 792-862; 1 Kinkead, Torts, 191-211; Bouv. Dic. (Assault:

Assault.—

Battery); And. Dic.; 2 Bish. C. L. 22-72; Bish. Torts, 186-204; Cook, Corp.; 5 Cyc. 1020-1109.

Practical joke; croton oil administered for. is an assault. S. v. Monroe (1897), 121 N. C. 677, 43 L. R. A. 861, 1 Am. & Eng. Encyc. Law, p. 804 (1st ed.). *What is.* Nelson v. Crawford (1899), 122 Mich. 466, 81 N. W. 335, 80 Am. St. 577. *By agreement.* C. v. Colberg (1878), 119 Mass. 351, 1 Am. Cr. Rep. 59: cases; S. v. Beck.

ASSEMBLY: 1 McClain, C. L. 1003.

ASSENT: Essential for a contract. *See* CONTRACTS; 9 Cyc. 245; Lampleigh: 301-306; §§ 12, 43-50, Hughes' Conts.; L.C. 306, 320; Smout v. Ilberry; Hunt.

Mental deficiencies impeach. §§ 51-61, Hughes' Conts.; L.C. 416; Chesterfield.

Letters; contracts by. Adams v. Lindsell; L.C. 326; §§ 44, 47-49, Hughes' Conts.

To tickets of common carriers. Pa. R. R. v. Loftis; Cherry v. R. R.; R. R. v. Lockwood: 352.

How pleaded. L.C. 301: Cases.

ASSIGNATUS UTITUR JURE AUCTORIS: An assignee is clothed with the rights of his principal. Bro. Max. 464-478.

Cited, Hughes' Proc. 322; § 289, Gr. & Rud.

LEADING CASES. Lickbarrow v. Mason; Bassett v. Nosworthy; Le Neve v. Le Neve; Brice v. Bannister, L.C. 394-398: cases; Ryall v. Rowles; Warmstrey v. Tanfield; Miller v. Race; Swift v. Tyson; Edwards v. Allouez Co.; Grain v. Aldrich; Marzetti v. Williams; Compton v. Jones; Bentley v. Vilmont; Field v. Mayor of New York; Bouv. Dic.; And. Conts. 207-235. *See* BONA FIDE PURCHASERS.

The principal maxim means what it says in all relations. It is the "modern rule." 3 Page, Conts. 1255-1289.

Whatever survives is assignable, is the modern rule. Torts to property may be assigned, but torts to the person and rights arising from fraud, it is held, cannot be assigned. *Actio personalis,* etc.

A personal wrong cannot be assigned. Coughlin v. R. R. (1877), 71 N. Y. 443, 27 Am. Rep. 75 (attorney can acquire no interest in); Greenh. Pub. Pol. 395; 70 L. R. A. 574.

Assignability of cause of action for personal injury. North Chicago R. R. v. Ackley (1897), 171 Ill. 100, 44 L. R. A. 177-193, ext. n.; (cases from all courts); *Actio personalis,* etc.

Assignee of negotiable instrument. May get a higher right than the principal had. Miller v. Race; Swift; Lickbarrow: cases; Bell.

An assignee stands in the shoes of his principal; but if he is a *bona fide* purchaser then far better. Swift; Olds v. Cummings (1863), 31 Ill. 188 (assignment of mortgages).

Partial assignments upheld. Grain v. Aldrich; 3 Page, Conts. 1265.

Checks on banks are not generally an assignment of the fund. *See* COMMERCIAL PAPER; Marzetti; 3 Page, Conts. 1280.

Assignees stand in the shoes of their principals. Subject-matter of a suit may be assigned either before or after suit, and, if after suit, assignee may be substituted *pendente lite.* *See* Grain; Gradwohl.

Assignatus.—

Part of a chose in action may be assigned. Gradwohl; Grain; Avery v. Cooper (1899), 92 Tex. 337, 71 Am. St. 849, n.

Assignments *pendente lite;* assignee may be substituted if desired. Sto. Pl. 117, 156, 351, 351*a*.

Assignee has same rights as assignor to priority of lien, etc. Drennen v. Mercantile, etc., Co. (1896), 115 Ala. 592, 67 Am. St. 72, n.

An injury from a conspiracy to defraud is not assignable. Farwell Co. v. Wolf (1897), 96 Wis. 10, 65 Am. St. 22, n.

Assignability of a contract for personal services. Robinson v. Davidson; Campbell v. Board of Comm'rs Sumner Co. (Kan., 1902), 67 Pac. Rep. 866.

Fraudulent injuries cannot be assigned. The right to sue for fraud is personal. 1 Bigl. Fraud, 190, 209; Bell v. Johnson (1884), 111 Ill. 374, *stated* 1 Bigl. Fraud, 198; *Actio personalis.*

Assignee of a right of action arising from fraud cannot sue thereon. Zabriskie v. Smith (1855), 13 N. Y. 322, 64 Am. Dec. 551, 1 Bigl. Fraud, 199, 214.

Notice to debtor; first assignee giving notice has precedence. Graham, 124 Cal. 117, 71 Am. St. 26-36, ext. n. Crouse, 130 Mich. 347, 97 Am. St. 479 (of a lease).; Phillip's, 205 Pa. 515, 97 Am. St. 746; 3 Page, Conts. 1272.

Of leases. See Sexton.

Life insurance policy; assignability of. Rylander, 125 Ga. 206, 6 L. R. A. (N. S.) 128-136: *contra* cases.

Decree for alimony is not. Fournier, — Mich. —, 7 L. R. A. (N. S.) 179.

Right of parties to prohibit assignment of a contract to make it non-negotiable. Mueller. (restrictions on assignability); 3 Page, 1263.

Assignments generally. 4 Cyc. 6-112; 3 Page, Conts. 1255-1289; L.C. 394-398.

What an assignee assumes. 3 Page, Conts. 1267. Covenants running with the land. 3 *Id.* 1285-1289.

ASSIGNMENT: See *Assignatus utitur.*

ASSIGNMENT FOR THE BENEFIT OF creditors. Grover v. Wakeman (1883), 11 Wend. (N. Y.) 187, 25 Am. Dec. 624-656*n*, 1 Am. L. C. 68-86*n*, 6 Gray's Cas. Prop. 266; 2 Kent, 532-536; Pars. Conts.; Per. Trusts; Thomas v. Jenks (1835), 5 Rawle, 221, 1 Am. L. C. 61-86, 6 Gray's Cas. Prop. 281, 2 Kent, 526; Bank of Little Rock v. Frank (1896), 63 Ark. 16, 58 Am. St. 65-101, ext. n.; 2 Beach. Conts. 1232-1249; 2 Encyc. Pl. & Prac. 865-919; 4 Cyc. 120-288; May v. Tenney (1892), 148 U. S. 60 (37 L. ed. 368*n*); Turnpike v. Schaefer (1886), 76 Ga. 109, 2 Am. St. 17. Composition agreements. *Sub* Cumber. Attachment will lie against goods in hand of assignee. Enderlin State Bank, *In re* (1894), 4 N. Dak. 319, 26 L. R. A. 593-605, ext. n.

Preferential assignments. See FRAUDULENT CONVEYANCES. Is a preference by mortgage or sale an assignment for creditors? Tittle v. Van Leer (1895), 89 Tex. 174, 37 L. R. A. 337-271, ext. n. Transfer of property out of the state. Long v. Forrest (1892), 150 Pa. 413, 23 L. R. A. 33-58, n. Officer cannot assign salary. Dickinson v. Johnson.

ASSIGNMENT OF ERRORS: Are an appellant's pleading and cannot be waived and secure a review of waivable matter. Ell. App. Proc. 300, 322; *see*

Assignment.—

APPELLATE PROCEDURE; Bouv. Dic.; ERROR; 2 Cyc. 985-1012; L.C. 123, 186, 290*b*-296; §§ 8-12, 169-173: *Consensus tollit errorem,* Max. No. 13,. Hughes' Proc.; § 53 (CONVENIENCE), Gr. & Rud.

The statutory record is surplusage except as it is required by the assignment of errors. The exceptions record presents exception matter only, for an appellant in an appellate court of errors; being the only party in interest, he can waive or condone or forgive error, and so he does wherever he has not made objections, taken exceptions, made a motion for a new trial wherever necessary and therein alleged error (*see* ALLEGATIONS) precisely and with certainty. All of those matters must be incorporated in the statutory record, and then upon this error must again be alleged, with precision, aptly and formally. § 53 (Convenience), Gr. & Rud. This record is only opened when required by the assignment, and then only to the extent it properly calls for. Bray. Except as shown by the motion for a new trial and the assignment of errors all error is waived. *Interest reipublicæ,* etc.

All pleadings are strictly construed against the pleader. Verba fortius, etc. And particularly is this true of formal or dilatory pleadings. *See* ABATEMENT; Kraner: 299; Atlantic. What one does not allege he does not claim. *De non apparentibus,* etc.; and what he does not prove cannot be given him. These profound principles surround the practice relating to the assigning of error. See *Dolus,* etc.

Objections must be specific. That evidence is "incompetent, irrelevant and immaterial," is too general and indefinite to present any available question. *Expressio unius,* etc.; *Dolus;* L.C., 123; Winona Case; Mortgage Trust Co. v. Moore (1897), 150 Ind. 465. See L.C. 290-296.

Defect must be specifically pointed out. No question can be presented on appeal to the rendition of a judgment on the verdict unless the objection in the court below particularly points out the defect or mistake therein and asks that the same be corrected. Deitsch v. Wiggins; § 53 Gr. & Rud.; Tucker v. Hyatt (1898), 151 Ind. 332, 338: cases; Winona Case; L.C. 290*b*. §§ 102, 169-173, 197, Hughes' Proc.

Assignments of error must be specific. That the court erred in entering judgment is not a specific assignment of errors, as is contemplated. L.C. 123, 290*b*-296. Seisler v. Smith (1897), 120 Ind. 88, 90.

And must accurately describe the error—

Assignment.—

the matter. Singer v. Administrator (1897), 150 Ind. 287, 290, 292. § 53, Gr. & Rud.

Must be argued, else they are waived. L.C. 186. Hulbert v. Chicago. And if not mentioned in opening brief, they cannot be argued in reply brief. Schumacher v. Bell (1895), 164 Ill. 181; Arnold v. Arnold (1889), 124 Ala. 550, 82 Am. St. 199; Ward v. Hood, 124 Ala. 570, 82 Am. St. 205 (repetition of in brief is not sufficient; must be argued at length).

Rehearings not allowed for omission to argue. Wachendorf v. Lancaster (1883), 61 Ia. 509; Ogle v. Manlove (1892), 133 Ind. 55.

Waiver of, by failing to argue. Robinson, etc. Co. v. Hathaway (1898), 150 Ind. 679, 680; Atlantic; Hulbert v. Chicago; Schumacher, *supra;* Gordon v. Comm'rs (1897), 169 Ill. 510.

What is not assigned is waived, and courts are obligated to respect this rule. Brown v. P. Except defects of record proper. Windsor v. McVeigh, L.C. 1: cases.

Must be made; rules of court requiring, are mandatory. Cannot be imported by argument. Lathrop v. Tracy (1898), 24 Colo. 382, 65 Am. St. 229; Gibler v. Mattoon. Statute cannot require, as to error appearing on the mandatory record. Windsor v. McVeigh: cases.

Motions for new trials are the foundation for the assignment of errors. L.C. 296; Zimmerman v. Gaumer (1898), 152 Ind. 552; Singer v. Tomoehlen (1898), 150 Ind. 287; L.C. 296. *See* NEW TRIAL.

Assignment of error must present all parties. Omission of any is fatal. Loucheim v. Seeley (1898), 151 Ind. 665-667. *See* Jordan v. Brown. Joinder in error will not waive such a defect. It is incurable. Loucheim v. Seeley; Garside v. Wolf (1893), 135 Ind. 42.

Appellate court notices and disposes of each error assigned. McDonald v. C. (1899), 173 Mass. 322, 73 Am. St. 293; U. S. v. Cruikshank: 232. A practice ignoring this rule would be permissive of gross neglect and even abuses. But if one exception is sustained, others may be omitted. Bowen v. Guild (1881), 130 Mass. 121; Gray's Cas. Prop. 86.

ASSOCIATIONS: 4 Cyc. 301-416.

ASSUMPSIT. L.C. 308, 320. 2 Gr. Ev. 101-136*a*; 1 Chit. Pl. 111-121; Bouv. Dic.; And. Dic.; Ans. Conts. 39, 40, 365; 4 Cyc. 319-360.

Indebitatus assumpsit. Bouv. Dic.

ASTLEY v. REYNOLDS: Duress. *See* Sasportas.

ASYLUMS: 4 Cyc. 362-365.

ATCHISON v. PETERSON (1874), 20 Wall. (U. S.) 507; Blanch. & W. L. C. Mines, 730, 1 Mor. Min. Rep. 583; Pom. Water; Basey v. Gallagher (1875), 20 Wall. 670; 1 Mor. Min. Rep. 683; Kinn. Irr. q. v.; Sturr v. Beck (1890), 133 U. S. 541-552.

Appropriation of water; what is. 1 Mor. Min. Rep. 583-699: cases. *Aqua currit,* etc.

ATLANTIC COAST L. R. R. v. BENEdict Pineapple Co. (1906), — Fla. —, 42 So. 529, 532-536.

Every presumption is to be made against a pleader, is a rule of morals, necessity, convenience and reason. This case cites with approval, Dovaston: 217, but not as to its rejection of the three degrees of

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certainty; also, Draper, 27 Kans. 484, *loc. cit.* 487. *Verba fortius,* etc., applied and upheld.

This rule prevails in all states as to substance, but not in all as it does in Florida as to formal matters: cases. The erudite and labored opinion is greatly impaired by the last proposition it announces. Indeed, it practically concedes that *Verba fortius,* etc., applies to all pleadings and everywhere alike. There were cited, Chitty, Stephen's Abbott's Trial Briefs and New York cases; nevertheless the learned court could not find the light it sought. *See* Preface, DATUM POSTS.

Errors must be assigned, also argued, otherwise they are abandoned; and if a party abandons this is waiver. Hulbert; Gibler: 96; 35 Ind. Ap. 281, 111 Am. St. 163; Greenman, 144 Mich. 534, 115 Am. St. 466 (calling attention to insufficient). *See* APPELLATE PROCEDURE; AIDER; ASSIGNMENT OF ERRORS.

It is a conserving principle of procedure to hold that all matter not mandatorily required may be waived. Windsor: 1: cases; *see* ABATEMENT; WAIVER; L.C. 290*a*-299.

Errors assigned will be noticed, discussed and disposed of by an appellate court, as in U. S. v. Cruikshank: 232; Hulbert.

ATTACHMENT: Is a statutory remedy and is strictly construed. Friedenberg v. Pierson (1861), 18 Cal. 252, 79 Am. Dec. 162-174, ext. n.; Ireland v. Adair (1903), 12 N. D. 29, 102 Am. St. 561, n.; Wap. Attach. & Garn.; Drake, Wade, Shinn, on Attach.; Brown, Jurisdic. 490-536; Cook, Corp., malicious attachment; remedies. Granger v. Hill; Tisdale v. Major (1898), 106 Iowa, 1, 68 Am. St. 263-280, ext. n.; Bouv. Dic. Bonds; remedies on. Trapnall v. McAfee; Blair v. Reading.

Notice essential for proceedings. Pennoyer v. Neff: 58. Affidavit for must be sufficient. Teutonia, etc. Co. v. Turrell (1898), 19 Ind. Ap. 469, 65 Am. St. 419, n.; Drake, Attach. 86-90, 101*a*; 1 Shinn, Attach. 1-50; Cooper v. Reynolds; Roberts v. Burns (1900), 48 W. Va. 92, 86 Am. St. 17, n. Must be certain. Pain: 107. Nature; effect of; judgment in. Cooper v. Reynolds; Pennoyer v. Neff: 58.

Foreign cars not a subject of. Connery v. R. R., 92 Minn. 20, 104 Am. St. 659-664, n.

ATTEMPTS: R. v. Collins, B. & H. Lead. Cases; P. v. Gardner (1896), 144 N. Y. 119, 9 Am. Cr. R. 82 (evidence of motive); 1 McClain, C. L. 220-229; Bouv. Dic., And. Dic., 3 Gr. Ev. 2; 2 Bish. Cr. Proc. 71-97, 634-636; Cornwell v. Fraternal, etc. Co. (1896), 6 N. Dak. 201, 66 Am. St. 601, 40 L. R. A. 437; 12 Cyc. 176-183.

ATTESTATION: *See* AUTHENTICATION; CERTIFICATES; ACKNOWLEDGMENTS; Bouv. Dic.

ATTORNEY GENERAL: 4 Cyc. 1025-1036.

ATTORNEYS: 2 Gr. Ev. 137-140, Mech. Ag., Reinhard, Ag.; Bouv. Dic. (retainer), 916; And. Dic.; 4 Cyc. 897-1023.

Liable for false pleading, etc. L.C. 105. Weeks, Attys. 81. Disbarment of. Bouv. Dic. 90-94; Philbrook, *In re,* 45 Am. St.

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76, n. Malicious acts; liable for. Barker, *infra.* Defamation; arguments; pleadings. L.C. 160. Regulation of business of. 1 McClain, C. L. 37; by municipalities, 73; embezzlement by, 627-629; extortion by, 914; for procuring pensions, 1348.
Liability for wrongful acts to third persons. Barker; Weeks, Attys. 133; Fischer v. Langbein (1886), 103 N. Y. 84; Bro. Max. 133; Green v. Elgie (1843), 5 Q. B. (48 E. C. L. R.) 99.
Are liable for corrupt and illegal practices. Hoosac Tunnel, etc. Co. v. O'Brien (1884), 137 Mass. 424, 50 Am. Rep. 323; Weeks, Attys. 132; Blair v. Reading; 93 Am. St. 206.
Void proceedings; are liable for acts done under. Weeks, Attys., § 133: cases; Bro. Max. 133; Barker.
Disbarment for bad moral character. P. v. Sweet (1903), 200 Ill. 442, 93 Am. St. 206, n. Disbarment proceedings. *Ex parte* Finn (1898), 32 Oreg. 519, 67 Am. St. 550, n.; *Re* Carl Lentz, 65 N. J. 169, 50 L. R. A. 415.
Unauthorized appearance of; remedy. Harshey.
Client may dismiss suit in violation of contract with attorney. Cameron, 200 Ill. 84, 93 Am. St. 165-179, ext. n.
Attorney may control a cause; client cannot. Toy, 128 Cal. 558, 79 Am. St. 70, 180. Liens of. Hanna, 5 Ind. Ap. 163, 51 Am. St. 251-281, ext. n.; New Memphis Gas Light Co.: cases, 105 Tenn. 268, 80 Am. St. 880 (must be upon funds in court). Contracts with clients; validity. Shirk, 156 Ind. 66, 83 Am. St. 150-187, ext. n. (cannot contract for the subject-matter in litigation). Bro. Max. 747, n.; 83 Am. St. 186. Liability of attorney to client for mistake. Hill v. Mynatt (1901) (Tenn.), 52 L. R. A. 683, ext. n. Notice to agent is notice to principal. Agra; Ross v. Houston. *See* NOTICE.
AUBURN, ETC., v. LEITCH. L.C. 9. §§ 240, 283, Hughes' Proc.
AUCTION: 4 Cyc. 1038-1056; Payne: 307. Puffers at, vitiate a sale. L.C. 364. *See* §§ 139, 143, Hughes' Conts.; Bouv. Dic.; And. Dic.
AUDI ALTERAM PARTEM: The law hears before it decides, or, no one is condemned unheard. Bro. Max. 113-116; Max. No. 1; §§ 51-78, Hughes' Proc. Windsor: 1; Cliff Co. v. Negaunee Co., *citing* Windsor: 1; Pennoyer: 58. *See* DUE PROCESS OF LAW; Hughes' Proc.
Cited, pp. 11, 36, §§ 1, 5, 5*a*, 13, 17, 20, 21, 28, 31, 34, 49, 51-57, 79, 87, 99, 101, 106, 109, 120, 121, 133, 144, 152, 152*a*, 160, 161, 165, 167, 169*a*, 178, 183, 199, 203, 205, 214*a*, 236, 254, 255, 276, 278, Hughes' Proc.
Cited, §§ 3, 24, 33, 46, 52, 62, 70, 93, 95, 118, 119, 122, 123, 146, 177, 203, 216, 239, 263-267, 268, 269, 278, 296, Gr. & Rud.
A judgment in personam depends on actual not constructive service of process. Pennoyer: 58; Williamson: 65: cases.

King James so illy understood this maxim that he conceived the idea of hearing causes as a matter of pastime, and with indifference as to a full and attentive hearing. He

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was turned aside by Coke, who told him only his judges could hear and determine causes. His notion of equity was that he could hear the complainant and decide the cause. But Bacon instructed him that an opportunity must be afforded each party before judgment. This requirement was too serious an undertaking for his royalty, so he laid down his juridical ambitions and went hunting at Royston.

These facts will indicate the crude conceptions that are often met as to essential ceremonies in administering the laws. They also show the incompetency of a king, whose immediate successors were swept away by the rising tide of human progress and its demand for enlightenment and just rulers. These should well comprehend the principal maxim and that from it as a fountain flow numberless rivulets.

General observations; principles; cases. Extended discussions of notice and of an opportunity to be heard are found in relation to many subjects and especially wherever jurisdiction is an element. The principal maxim and cases illustrating its application should be read in connection with the maxims of procedure.[1]

Phases of the maxim are discussed in Haddock (1906), Andrews (1903), also in Weltmer. From these cases it may be said that what was juridically presented and judicially decided, what could or might have been decided, and an opportunity to be heard, comprise the leading features and the largest discussions of the law.

The Haddock, Andrews, Oakley, Windsor and Cruikshank cases show that the study of procedure is a study of government, also that the maxims, precedents and customs comprising the prescriptive constitution of England are interpreted into the law of America exactly as if it had an unwritten constitution. The broad, liberal construction discoverable in those cases makes the question of

1—§ 51, *et seq.,* Hughes' Proc.; Windsor: 1; Galpin; Oakley; Pennoyer: 58; Weaver: 67; Needham; S. v. Baughman: 268; Bloom: 266; Borden: 267; Ferguson: 264; Starbuck: 263; Campbell: 2; U. S. v. Cruikshank: 232; Rushton: 5; Shutte; Williamson: 65.

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whether there is a written constitution in America quite immaterial.[2]

The right to be heard or an opportunity to be heard may be classed as one of the highest laws. It is contemplated in the scheme of protection. It is closely related to morals; it is indispensable for the exercise of jurisdiction. Juridically to present the fact and to prove it the mandatory record is conceived, is protected and vindicated with jealous concern as is shown by Windsor and Pennoyer; Crain; Williamson.

The right to be heard is imported in judicial or quasi judicial proceedings, as taxation whether it is mentioned in constitution or statute or not. It is interpreted as part of the law, as is public policy, necessity or morals. It is a fundamental right and inquiry after it is not barred by form or respect for the verity of records. Haddock; Andrews; Ferguson: 264; Needham: 261; Pennoyer: 58; Windsor: 1; Mills: 57.

Tests of an adjudication involve a right comprehension of the constitutional or record rule, the mystic rule and the coram judice rule. These are discussed in relation to construction, constitutional law and certainty. From the conserving principles of procedure the requirements may be perceived. §§ 83-123, Gr. & Rud. From these due process of law is easily defined.

The test of what is an adjudication arises in considerations of collateral attack, res adjudicata (former jeopardy), due process of law and other conserving policies as already referred to.

Tests of a hearing must generally be evinced by the mandatory record. It is its function to present that fact or chain of facts upon which the hearing depends. Such are the requirements of the due process of law record, which throughout and at all stages is construed against the pleader or him claiming the benefits of an estoppel or title to property. Clem: 2*c*.

Fraud and arbitrariness are destructive of all claims for an adjudication. Windsor: 1; Dimes: 276; Hauswirth: 51; Ferguson: 264; Needham: 261; *Ex dolo malo non oritur actio.*

A judgment resting on false allegations or denials may be assailed therefor. Wonderly; Graver. Courts will inquire into the cause of action and see that it is sufficient or such as should attract jurisdiction. Weitmer: 268*a*; Campbell: 2; *Fabula non judicium.* Insufficiency or illegality appearing upon the face of a substantial pleading is a ground of general demurrer, and this is never waived. It may be first raised or renewed upon motion in arrest or likewise on collateral attack. McAllister: 3; Slacum.

Wherever the foundation of a judgment must attend it for evidentiary purposes

2—Church of the Holy Trinity v. U. S.

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there the ground of the general demurrer or other infirmities of substance may be raised. Horan v. Wahrenberger: 85; Windsor: 1; Campbell: 2; Clem: 2*c*. Were this not so then it would be better to omit the introduction of the record altogether. Vain and fruitless things should never be required.

An authority must be pleaded and if denied then proven. The *onus* is on the actor. *Semper præsumitur pro negante; Actore non probante reus absolvitur.* The allegation (U. S. v. Cruikshank: 232), the admission (Bradbury: 35), the denial (Dickson: 34) and the issue (Dickson; Crain v. U. S.; Avon; Aylesworth; Munday) are important factors. All of these must appear from the right record and withstand the test of the mystic rule: Every presumption is against a pleader (*Verba fortius*, etc.). This rule applies with unvarying strictness at all stages and especially strict in appellate procedure, collateral attack and *res adjudicata.* This view has been denied but such denial is a *reductio ad absurdum.* It is an incongruous view that tends to dismember procedure and consequently jurisprudence. Such is the importance of a great canon of construction. Bacon sought to teach and well impress it. 64 Cent. L. J. 128-134, 167-174.

Throughout the examination of a record the rule is strictly applied: What was not juridically presented was not judicially considered. *De non apparentibus et non existentibus eadem est ratio*: see CAUSE OF ACTION; Weltmer: 268*a*; Clark v. Sires: 2*b*; *Fabula non judicium*: notes, Lampleigh: 301.

AUDITA QUERELA: Bouv. Dic.; And. Dic.; Freem. Judg.; 4 Cyc. 1059-1073.

AURIOL v. MILLS (MILLS v. A.) (1780), 1 H. Bl. 433, 4 T. R. (D. & E.) 94, 1 Sm. L. C. 1227-1253 (7th ed.). Pars., Chit. Conts., Wash. R. P., Tay. Land. & Ten., Wood, Land. & Ten.

A lessee is liable on his express covenants after he assigns, but not upon his implied ones. Sexton v. Chicago: cases.

Bankruptcy is no defense to an action upon covenants for rent.

AUSTIN R. R. v. CLUCK (1903), 97 Tex. 172, 77 S. W. 403, 104 Am. St. 463, n., 64 L. R. A. 494; *cited,* §§ 56, 96, 119, 125, 127, Gr. & Rud.

Courts are bound by their records, and the fixed rules necessary for the due administration of the laws, and not by exact obligations to do justice except as this is consonant with necessary rules of procedure. *Ita lex scripta est;* May v. R. R. (1905), 32 Mont. 522, 70 L. R. A. 111: cases; Planing Mill Co. v. Chicago; R. v. Goldsmith: 20; R. v. Solomons.

A party will not be compelled to submit to a physical examination. Austin; *see* PROFERT.

AUSTIN v. TENNESSEE, 101 Tenn. 563, 7 Am. St. 703, n.; S. C. (1900), 179 U. S. 343-388.

Federal regulation of commerce: cases; Gibbons.

Statutes may be valid in part and void in part. L.C. 236, 373. A state statute void as an unlawful regulation of interstate commerce may be valid in its application to internal commerce. 101 Tenn. 579.

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Statutes are presumed constitutional until the contrary is shown. Butterfield v. Stranahan (1904), 192 U. S. 470, 492: cases (must clearly appear). Burden of showing unconstitutionality is on the affirmer. 101 Tenn. 572. *See* STATUTE; CONSTITUTIONAL LAW.

Judicial notice taken that cigarettes are "inherently bad and bad only." Contra: 179 U. S. 343, 348. *See* L.C. 181.

Commerce; regulation of; original packages. See JUDICIAL NOTICE; POLICE POWER.

AUTHENTICATION OF PUBLIC RECORDS. Bouv. Dic.; 1 Gr. Ev. 503-506, 548. Act of congress of May 26, 1790, § 1 (1 Stat. at Large, 122), Act March 27, 1804, §§ 1 and 2 (1 Stat. at Large); Kan. Pac. R. R. v. Cutter (1877), 19 Kan. 83, 9 Am. Neg. Cas. 355 (form of certificates; clerk, not deputy, must make). By office and by sworn copy. *See* COPIES; CERTIFICATES; FOREIGN JUDGMENT.

AUTHORITY: Pleadings must show. §§ 61, 124, 132, Gr. & Rud. L.C. 4, 266; Rushton: 5; Campbell v. Greer: 2*a*; and from the right record. Planing Mill Co. v. Chicago; Austin R. R.; Rice v. Travis.

Of agent not presumed. See *Caveat emptor;* Batty. In general, when a party has occasion to justify under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his pleading. Entire record necessary to show jurisdiction of court to enter a foreign judgment. Swing, 78 Ark. 246, 115 Am. St. 38. Rice v. Travis.

Justification must be pleaded. J'Anson: 91; Woodridge v. Connor; Mostyn v. Fabrigas: 274; Tarble's Case: 247; Buck v. Colbath; Tyler v. Pomeroy; Virginia Coupon Cases. Those who sue in a representative capacity must show authority, *e. g.,* administrators and executors.

As a defense for crime. 1 McClain, C. L. 115. *See* AGENCY; Ans. Conts. 304, 345. Or tort. Tyler.

Authority to execute a deed must be given by deed. Comyn, Dig. (Attorney, C. 5); 4 T. R. 313; 7 *id.* 207; 1 Holt, 141; 9 Wend. 68, 75; 5 Mass. 11; 5 Binn. (Pa.) 613; Hibblewhite. *Nihil tam conveniens,* etc. Of corporation officials. Cook, Corp.; Batty.

AUTOMOBILES: Liability for frightening a horse with. Shinkle v. McCulloch (1903), 116 Ky. 960, 105 Am. St. 249. *Law of:* Nash v. Clark (1904), 216 Ill. 31, 1 L. R. A. (N. S.) 215-237, ext. n.; Christy v. Elliott (1905), 216 Ill. 31, 108 Am. St. 196-219, ext. n.

AUTREFOIS ACQUIT AND CONVICT: Bouv. Dic. *See* FORMER JEOPARDY; U. S. v. Perez: 69; *Res adjudicata.*

AVERMENT: Bouv. Dic.; And. Dic. *See* ALLEGATIONS.

AVON MFG. CO. v. ANDREWS (1862), 30 Conn. 476, 485-488. *See* ISSUES.

An issue must arise from the pleadings filed by the parties. Munday: 79: cases; Borkenhagen: 81; Bassett; Aylesworth v. P.

This is the rule under the English Judicature Act. It was adopted by Connecticut. Garland. It is opposed to the "Theory of the Case."

AWARDS: Arbitration and awards. Nettleton v. Gridley (1852), 21 Conn. 531, 56 Am. Dec. 378-384; Kinney v. Baltimore, etc., 15 L. R. A. 142, n. (agreement to arbitrate), 8 Rul. Cas. 557; Bouv. Dic.; And. Dic.; 3 Cyc. 581-810. Conclusiveness of awards. Hines v. Wright (1892), 62 Conn. 323, 36 Am. St. 344, n.

Superior courts cannot be ousted of their jurisdiction by contract. Scott v. Avery (1856), 8 Exch. 497, 5 H. L. Cas. 811, Williston's Cas. Conts. 195, 2 Pars. 828, Ans. Conts. 185, 3 Kent, 376, Gr. Pub. Pol. 471; Baltimore R. R., 56 Ohio St. 224, 60 Am. St. 745, n.; Hamilton v. Liverpool Co., 136 U. S. 242, Huff. & Wood. Conts. 351, 2 Gr. Ev. 60-81 (arbitration and award).

Conditions precedent; referee to make estimates; contract for, binding. McAvoy v. Long (1851), 13 Ill. 147; Gr. Pub. Pol. 471: cases; Hennessey (1894), 152 Ill. 505, 43 Am. St. 267, n.

Awards stand on the same footing as judgments as to presumptions of regularity. Steele, 106 U. S. 141; Morville, 123 Mass. 129, 25 Am. Rep. 40.

Agreement to submit to arbitration a controversy which has not yet arisen is void. Pepin v. Societa, 23 R. I. 81, 91 Am. St. 620. *See* CONDITIONS PRECEDENT.

AYLESWORTH v P. (1872), 65 Ill. 372 (S. P. Hoskins v. P.). A plea essential upon the mandatory record. The best evidence and the proper evidence of an issue and a hearing must be presented. Munday v. Vail: 79: cases; Crain v. U. S.; Avon.

"What ought to be of record must be proved by record and by the right record." §§ 59, 83-104, Gr. & Rud. This rule is a conserving principle of procedure. Planing Mill Co.: 2*d*; Austin R. R. v. Cluck: cases; Campbell v. Greer: 2*a*.

BACKHOUSE v. BONOMI (1861), 9 H. L. Cas. 503, El. Bl. & El. 622 (96 E. C. L. R.), 11 Eng. Reprint, 825, 13 Mor. Min. Rep. 677, 16 Rul. Cas. 216, n., Mews' E. C. L., Cool. Torts, 706: cases.

Sub nom Bonomi v. Blackhouse, El. Bl. & El. 622, 3 Kent, 448, 3 Suth. Dam. 363; Cool. Torts, 706-708; Bish. Torts, 909; 1 Wat. Tres. 9; Bro. Max. 366, 901; 166 Pa. 547, 45 Am. St. 691; 10 Rul. Cas., q. v.; Lewey v. Frick Coal Co. (1895), 166 Pa. 536, 28 L. R. A. 283 (mining coal in concealment); Pearsall v. Smith.

Lateral support of land; Statute of Limitations. Kinkead Torts, 691-693. *See* LIMITATIONS; *Sic utere,* etc. Easements; lateral support. Smith v. Thackerah: cases; 2 Kinkead Torts, 690-694: cases.

BACON (Lord Francis). Beacon Lights of, §§ 1-30, Gr. & Rud. Plan of writing the law. §§ 9, 10, Gr. & Rud.; 1 Kent, 475, pp. 1-3. Bacon and Coke. § 13, Gr. & Rud. Vindication of. §§ 20, 80, Gr. & Rud.

Bacon (Francis), born 1561, died on Easter day, April 9, 1626. Lord Chancellor 1617-1621, son of Nicholas Bacon, Lord Chancellor under Elizabeth, 1558-1579. Francis grew up around the throne and was nursed, coddled and adored by the queen, who always called him her little Lord Chancellor. In these facts

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is found ample excuse for the part Bacon played in the prosecution of the Earl of Essex at the queen's instance and request. Considering her hold upon him, it is difficult to see how he could have shirked his duty. Because of the queen's affection for him he was also a favorite with Essex. Still Bacon prosecuted him.

> Not that we love Cæsar less, but that we love Rome more.

The scholar, the historian and the lawyer are deeply interested in Bacon, Europa's grandest son, the birth he was born, the life he lived and the death he died, second only to that of Asia's most heroic character, who from the stable and the desert came to lessen the sorrows of humanity, to light, to show and to lead the way. Complementary to what is observed in volume one, it seems proper further to add some interesting and instructive facts.

Twenty-eight charges were reported against him by the commons. The House of Lords tried him. They were a willing court and on the day of their appointment proceeded to take evidence. The charges arose from general disorders and involved persons who were not disposed to sink alone. They were anxious to lead their pursuers upon nobler game.

Next follows the first charge and the confession thereto:

> 1. "To the first article of the charge, *videlicet* in the cause between Sir Rowland Edgerton and Edward Edgerton, the Lord Chancellor received five hundred pounds on the part of Sir Rowland Edgerton before he decreed the cause:
>
> "I do confess and declare that upon a reference from His Majesty of all suits and controversies between Sir Rowland Edgerton and Edward Edgerton, both parties submitted themselves to my award by recognizance reciprocal in ten thousand marks apiece; thereupon after divers hearings, I made my award with the advice and consent of my Lord Hobart. The ward was perfected and published to the parties, which was in February; then some days afterward, the five hundred pounds mentioned in the charge was delivered unto me. Afterward Mr. Edward Edgerton fled off from the award; then, in midsummer term following, a suit was begun in chancery by Sir Rowland to have the award confirmed; and upon that suit was the decree made which is mentioned in the article."

The second charge was for receiving, soon after taking the seal, £400 from Edward Edgerton. He answered that this was given him "for favors past, and not in respect for favors to come."

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The third charge was for receiving jewelry in a cause pending. He admitted the gift, but fixed its time a fortnight after the case had ended.

The fourth charge was made like the third. In this case he confessed accepting a present of £200 and 100 pence, *pendente lite:* "but yet I have a vehement suspicion that there was some shuffling between Mr. Shute and the Register in entering some orders, which afterwards I did distaste."

The fifth for accepting in *Monks' Case* £10 nine months after its disposal. Confessed.

The sixth, for accepting £100 in *Treavor's Case.* Confessed this came on New Year's as a present when he thought the case dismissed; but while it was practically disposed of still some incidental matters were still pending.

The seventh, for accepting a present long after the suit was disposed of. Confessed.

The remaining twenty-one charges are substantially of the same tenor and form as above, which are referred to so the reader can see and judge for himself.

In several cases other judges presided with him, as did Hobart in the first case. These associates did not dissent. The claim has never been put forth that any of the matters were wrongly disposed of, or were corruptly considered. On the contrary, they are admitted to have been correctly decided.

These last facts go far to show that the accused was suffering from great prostration, and lack of force of character; great depreciation is quite manifest. His accusers and their court he feared. He early petitioned them not to judge him unheard. This is significant. His degradation and the audacity and enterprise of his accusers seem to have dazed and unnerved him. His oscillations from confessions of corruption to confident hopes of lustrous vindication are incredulous. He was evidently much oppressed and dreaded his wily, powerful foes, whom he wished to have weighed in the balance.

It is difficult to extract exact facts relating to the Tudors and Stuarts

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and causes which led to the maelstrom of commotions in Bacon's times. Mary Queen of Scots, Elizabeth, James I. and Charles I., Cromwell and others stand out in bold relief and excite endless discussion, and will until the unity and philosophy of history is written, when the two revolutions and the great central figures, Cromwell and Napoleon, will be presented as prototypes originating from identically the same causes with like *sequelæ*.

Like Cromwell and Napoleon, Bacon left his name to the next ages and to foreign nations. The light of great suns causes deep shadows. The reader will see reflected the passions of men in Byron's ode to Napoleon and Browning's "Buried and Crowned."

The Armada was defeated in 1588. All are impressed with causes that exiled the Pilgrim fathers, who landed in December, 1620. Bacon was sentenced in April following. The times were peculiar; they were stormy and foreboding. Coke was marring his reputation making decisions like *Beverly's* and *Shelley's cases*. Bacon was making his glory by broad, enlightened opinions concurred in by Hobart and other judges that no one has ever questioned, and which are alleged to have been procured by bribery, the bribes consisting of *ex post facto* gifts. Those who had the prosecution in hand had not learned the modern methods of judicially declaring allegations to exist and evidence to support them in opinions to make these clear. Possibly this practice is somewhat distinctively "American law." Anyway the great criminal lawyer and politician of the renaissance looked carefully after the evidence. Bacon was convicted on his confessions. Now, was the *corpus delicti* proved? It cannot be proved by the confession itself. Therefore, the judgment of condemnation is limited by the particulars. Enough of these are above set out. In this connection, consider the maxim he made so prominent: *Verba generalia restringuntur ad habilitatem rei vel personæ* (general words must be restricted to the nature of the subject-matter or the aptitude of the person). This will also bear this construction, general words are limited by particular; or, universals are limited by particulars. Effect must be given each word and expression. Judgment must not be on fragments, but the ensemble, and an important part of this is the facts of a great notable political trial in the midst of dangers without and brewing revolutions within.

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In such times great judges often lose their reputations. In America an example is afforded in the *Dred Scott Case*, although it is cited with approval by the same high court in its latest cases.

Looking at the charges and the confessions thereto, the question is, was Bacon justly condemned?

Advances were made him by litigants who were old clients and acquaintances. Bacon said these were loans. In *three* of the cases the *hands that gave these afterward claimed them as loans against Bacon's estate*. The executor defended upon the ground the House of Lords had decided the supposed loans were bribes. These claims cast contradiction over their claimants. *Allegans contraria non est audiendus*. Of course if they gave them as bribes they were illegal and could not be recovered. *In pari delicto potior est conditio defendentis. Nemo allegans suam turpitudinem audiendus est.*

If it is conceded that Bacon's letters and confessions were altered by his enemies and prosecutors, as has been contended, then his defense is clear. If he was sane there must have been alterations. The opinion of the House of Lords depends upon the allegations and proofs. From these judgment must be formed by all intellects that understand the record rule, what ought to be of record must be proved by record and by the right record, and the mystic rule, one of Bacon's maxims, every presumption is against a pleader (*Verba fortius accipiuntur contra proferentem*).

A fact to be considered with Bacon's downfall in human affairs was the turmoil of a tumultuous period, in which the Stuarts, Buckingham (assassinated in 1627) and Coke were the great pieces on the chess board. The times were filled with the rumblings and the presage of a holocaust in human affairs; the times were portentous and lay between volcanic outbursts. Causes

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and forces that soon led to two revolutions were moving forward. Coke, a member of the House of Commons, actively led the assaults on Bacon; he no doubt framed the charges. He was exerting all his powers to destroy his own wife and fourteen-year-old daughter, and he succeeded. Bacon had stretched forth a protecting hand and spoken like words in behalf of the persecuted wife and daughter. In all this Buckingham figured; he gave the crown its spectacles to look through; King James was very weak and pliable.

Bacon was a philosopher and saw the conditions which were swirling whirlpools of mad revolutions, of regicides, of long parliaments and Cromwells. Afterward Mirabeau saw like conditions; he too knew the mirages.

Bacon wished to retire before such tides of events, such fierce assaults from implacable hatred and awful impending woes and wrecks as history recounts. A fair trial was impossible. Buckingham promised to secure kingly grace if only a confession to receiving money was made. Bacon trusted Buckingham and Coke inspired the latter. Bacon did not contemplate the awful sentence of the House of Lords, which was never executed either as to the imprisonment or the fine. One who would sacrifice his wife and daughter as did Coke would seek revenge on Bacon, and to get it would conspire with Buckingham to deceive Bacon for his overwhelming and lasting infamy. Involved in these events are also the names and estate of Hatton, Villiers and others prominent in the history of the times.

One of the strange attending facts was his constant insistence that he was the best Lord Chancellor from Becket to Ellesmere, inclusive, England ever had. Conceding his sanity, this was intended to express much from such a mind. Indeed the acceptance of gratuities in those times seems to have been somewhat a custom, and certainly in all ages from old clients and friends and those who desired appreciation from an exalted personage. Coke married two vast estates; he was thus rich. If presents were condemnation he could have made them for his purposes by other hands.

Great would have been Bacon's

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fame had he gone with the Pilgrims. Like Solon he should have quitted. But like Themistocles he was ever ready to obey every beck and call of the king to return and direct him, which he did far more than Buckingham reported to Coke.

Herodias had her revenge on John the Baptist, and Fulvia hers on Cicero, and Coke on his wife and Bacon, and it may be added, the civil law as well.

Bacon well perceived the effects of a sentence he did not expect, and which evidently came as a great surprise; it also defined the position of Buckingham and his alliance with Coke. These, the people and the times filled him with hopeless dread, as these passages in his will clearly indicate:

"I bequeath * * * my body to be buried obscurely. My name to the next ages, and to foreign nations." (See Life and Times of Bacon: Spedding). How he viewed his fall may be judged from the above.

"It will easily be believed that I enter with fear and trembling on the arduous undertaking of attempting to narrate the history and to delineate the character of 'the wisest, brightest, meanest of mankind.' I must say that I consider a life of Lord Bacon still a desideratum in English literature." 2 Campbell's Lives of the Lord Chancellors, 412; see also *seq.* 412-445; 3 *id.* 1-127.

Since codes have come as they have, it is now due to confess that Bacon gave the first practical illustration of them. The Judicature Act of England is founded upon his conceptions, which are indicated from this quotation:

"The 'orders' which he promised when he took his seat he soon issued to the number of one hundred, and they remain a monument of his fame as a great judge. They are wisely conceived and expressed with the greatest precision and perspicuity. They are the foundation of the practice of the court of chancery and are still cited as authority." 3 Campbell's Lord Chancellors, 114.

The King, the fountain of justice, was firmly told by Coke that only his judges could hear causes and order judgments. Bacon had to instruct him that he would have to hear both sides before he could give judgment. These facts will indicate the juristic abilities of the ablest of the Stuarts. He justified Coke's assaults and breaches of the peace and following violent coercion of his fourteen-year-old daughter to marry old John Villiers, elder brother of George, his favorite (Duke of Buckingham). Bacon was interfering

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and spoke for freedom of consent of the daughter, also the consideration for the wishes of her mother (Lady Hatton). The King adopted the views of Coke, that a wife was a "wench." For Villiers, the King and his gay and frivolous favorite, the Duke, threatened Bacon and gave him such fright for his office that he retired, retracted, made apologies and humiliating confessions to the mother of Villiers and to each of them and the King. The latter insisted that if the mother illegally took the daughter from the father, then he could regain custody of her, and therefor use violence, also disturb the public peace. With the King, his favorite and his brother John, their mother and Coke all combined and confederated, it is not difficult to see that some awful doom would overtake Bacon. He had done enough: he had interceded for a distressed and worried wife and mother and her infant daughter, who must be sacrificed upon the altar of her father's political ambitions, and how thoroughly was this done! There followed the brutally enforced union the natural, direct and probable consequences of the crime. The imperious, arrogant and short-sighted Coke sowed the wind only that he might reap the whirlwind; he sowed and he reaped. He offended one of the little ones and thereby tied a millstone to his neck. He got into the council and the star chamber; for his daughter and her dowry he got into positions to please friends and to punish enemies, and of course first and above all Bacon. And to aid him were the King, his favorite, his brother and their furiously enraged mother. And still he continued to confide in the Duke. He could not see that such a character was as treacherous as the Countess Nottingham, whose baseness cost Essex his life and caused Elizabeth agony to her grave. To gain York House—Bacon's birthplace—the cupidity of the Duke is disclosed, if more is needed beyond the brutal immolation of Coke's infant daughter.

The passions, the ambitions, the dreadful plots, betrayals and sacrifices that surrounded Bacon are not understood. The true situation has never been revealed. The MSS. left by Bacon were lost. Coke outlived Bacon eight years. The maxims that

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were published are chiefly valuable for the plan they disclose. They suggest nothing compared with the one hundred ordinances regulating procedure in the high court of chancery, which have governed it from thence forward, and which were adopted by the federal courts of America. When Bacon became Lord Chancellor he promised to settle and regulate the practice in the high court of chancery. This promise he fully carried out. Soon after his appointment he promulgated one hundred ordinances regulating that procedure. From these there has been no substantial departure to the present time. The statutes of the United States declare that in matters of equity the federal courts shall be governed by the high court of chancery, or in other words by the ordinances of Bacon. To what extent this has unified and influenced procedure throughout the English-speaking world can only be rightly estimated by the practitioners in equity causes and also by code practitioners who perceive those ordinances expressed in varied yet in substance the same language in codes of civil procedure. In the American states the practitioner in the federal courts carries but little of his professional equipment with him from state to state, except his practice in equity in the federal courts. Above all other lawyers the latter class are most indebted for the enlightened foresight which guided and directed the efforts of the great Lord Chancellor. He may be said to be the first great codifier whose labors remain an everlasting monument of his juridical learning and legislative ability. No doubt his labors and guidance greatly influenced the plan and conceptions of the English Judicature Act. It consists chiefly of ordinances promulgated by the Supreme Court of Judicature. Connecticut is the only American state that adopted it. It has many advantages over the clumsy, delaying and questionable legislative enactments of other states.

"5. The lie against nature in the name of Francis Bacon broke into high literary force with Pope. Before his day the scandal had only oozed in the slime of Welden, Chamberlain, and D'Ewes. Pope picked it, as he might have picked

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a rough old flint, from the mud; fanged it, poisoned it, set it on his shaft:

" 'Meanest of mankind!'

"When Bacon became the meanest of mankind, Raleigh was assailed, and Shakespeare driven from the stage. Rowe was tainting our national drama, St. John undoing our political philosophy, Hume training his mind through doubts of God for the task of painting the most manly passage of arms in all history as our greatest blunder and our darkest shame. How should Francis Bacon have escaped his share in this moral wreck?

"6. No man of rank in letters had yet soiled his fame; for the foes who had lived in his own age, who had danced with him in the Gray's Inn Masques, or had bowed to him as he rode down to the House,—even those who, like Sir Robert Cecil and Sir Edward Coke, had most to fear from his gladiatorial strength, and in the madness of that fear pursued him with taunts and hate,—had never dreamt of denying that his virtues and his courage stood fairly in line with his vast abilities of tongue and pen. They had called him blind when they could not see, as he could, all the faces of an object. They had denied to his gratitude the strong vitality of his intellectual power. They had spoken of his vanity, of his presumption, of his dandyism, of his unsound learning and unsafe law; but the malice of these rivals had never strayed so far as to accuse him to the ears of men who heard him in the House of Commons and met him at the tavern or the plays of a radical meanness of heart. Coke had called him a fool. Cecil had fancied him a dupe. But neither his rancourous rival at the bar, nor his sordid cousin at Whitehall, had ever thought him a rascal. That was the invention of a later time.

"The age that took Voltaire to be its guide found out that Bacon had been a rogue.

"7. Since then he has been the prey of painters and pasquins; his offenses deepening, darkening, as men have moved yet farther and farther from the springs of truth. Hume is comparatively fair to him. Hallam is less fair; though he will not, even for the sake of Pope, call Bacon the meanest of mankind. Lingard paints him with a more unctuous hate. Macaulay in turn is fierce and gay; his sketch of Rembrandt power: his lights too high, his sneers too black: noon on the brow, dusk at the heart. Nature never yet made such a man as Macaulay paints.

"9. What Hallam left dark and Campbell foul should be cleansed as soon as may be from dust and stain. It is our due. One man only set aside, our interest in Bacon's fame is greater than in that of any Englishman who ever lived. We cannot hide his light, we cannot cast him out. For good, if it be good, for evil, if it must be evil, his brain has passed into our brain, his soul into our souls. We are part of him; he is part of us; inseparable as the salt and sea. The life he lived has become our law. If it be true that the Father of Modern Science was a rogue and cheat, it is also most true that we have taken a rogue and cheat to be our God.

* * * * *

"17. To judge a man's life in mass

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would not be the way to please a Cecil or a Coke; the libidinous statesman who made love to Lady Derby, who sold his country for Spanish gold, who gave power to his infamous mistress Lady Suffolk to vend her smiles; or the acrid lawyer who jibed at Raleigh, who married a jilt for her money, who gave his daughter for a place. Nor is it the way to please those painters and lampooners who prefer dash to truth; for a man so judged is not to be hit on paper in a mere smudge of black and white, by dubbing him wise and mean, sage and cheat, Solomon and Scapin, all in one." Bacon (Dixon), pp. 3-9.

"Reform the code Bacon tells a house full of queen's sergeants and utter barristers, that laws are made to guard the rights of the people, not to feed the lawyers. The laws should be read by all, known to all. Put them into shape, inform them with philosophy, reduce them in bulk, give them into every man's hand. So runs his speech. A noble thought—a need of every nation under the sun—a task to be wrought at by him through a long life—to be then left to successors, who, after revolutions and restorations, commissions and reports, have it still in hand—undone! The plan, of which this fragment of a speech is the root, developed in his Maxims of the Law, and proposed as part of his great reform in the De Augmentis, has had more success abroad than it has found at home. It has been universally read, and most of all in France. It was translated by Baudoin, and inscribed to Sergier, Chancellor of France. In that country it has blossomed and come to fruit. But a French revolution was required for the achievement of this vast and philosophic innovation on established things, and the Code Napoleon is even now, in 1860, the sole embodiment of Bacon's thought." Bacon (Dixon), pp. 35-36.

"Any one who will be at the pains to study the Shakespeare plays, in the order in which Dr. Delius has arranged them (and which he considered to be the most correct chronological order), will see that they agree curiously with the leading events of Bacon's external life. So closely indeed do the events coincide with the plots of the plays, that a complete story of Bacon's true life has been drawn from them. The following notes may be suggestive:

"1st. *Henry VI.* The plot is laid in France and the scenes occur in the very provinces and districts of Maine, Anjou, Orleans, Poictiers, etc., throughout which Bacon traveled in the wake of the French court

"2nd. *Henry VI.* The battle of St. Albans. The incident recorded on the tomb of Duke Humphrey, *in an epitaph written circa* 1621 (when Bacon was living at St. Albans), of the imposter who pretends to have recovered his sight at St. Albans' shrine, is the same as in the play. See 2 Henry VI, ii, 1.

"The Taming of the Shrew, The Two Gentlemen of Verona, etc., *Romeo and Juliet,* and *The Merchant of Venice,* all reflecting Francis Bacon's studies as a lawyer, combined with his correspondence with his brother Anthony, then living in Italy. When Francis fell into great poverty and debt, he was forced to get help

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from the Jews and Lombards, and was actually cast into a sponging-house by a 'hard Jew,' on account of a bond which was not to fall due for two months. Meanwhile, Anthony, returning from abroad, mortgaged his property to pay his brother's debts, taking his own credit and that of his friends, in order to relieve Francis, precisely as the generous and unselfish Antonio is represented to do in *The Merchant of Venice.* This play appeared in the following year, and the hard Jew was immortalized as Shylock. The brothers spent the summer and autumn of 1592 at Twickenham.

"*The Midsummer Night's Dream* appears shortly afterwards. In this piece Bacon seems, whilst creating his fairies, to have called to his help his new research into the history of the winds, and of heat and cold.

"The plays and their various editions and *additions* enable us to trace Bacon's progress in science and ethical and metaphysical studies. The politics of the time also make their mark.

"*Richard II* was a cause of dire offence to the Queen, since it alluded to troubles in Ireland, and Elizabeth considered that it conveyed rebukes to herself, of which Essex made use to stir up sedition. The whole history of this matter is very curious, and intimately connected with Bacon, but it is too long for repetition here. See *Did Francis Bacon Write Shakespeare,* part ii, p. 26, and Bacon's *Apologia* and Apophthegms.

"*Hamlet* and *Lear* contain graphic descriptions of *melancholia* and raving madness. They appeared after Lady Anne Bacon died, having lost the use of her faculties, and 'being,' said Bishop Goodman, 'little better than frantic in her age.' She

Fell into a sadness, then into a fast,
Thence to a watch, thence into a weakness,
Thence to a lightness, and by this declension
Into the madness wherein,
like Hamlet, she raved, and which her children wailed for.

"The particulars of the death of Queen Elizabeth, which Bacon learned from her physician, bear a striking resemblance to passages in *King Lear.*

"*Macbeth* appears to reflect a combination of circumstances connected with Bacon. About 1605-6 an act of Parliament was passed against witches, James implicitly believing in their existence and power, and Bacon, in part, at least, sharing that belief. James, too, had been much offended by the remarks passed upon his book on demonology, and by the contemptuous jokes in which the players had indulged against the Scots. Mixed up with Bacon's legal and scientific inquiries into witchcraft, we find, in Macbeth, much that exhibits his acquaintance with the *History of the Winds,* of his experiments on *Dense and Rare,* and his observations on the *Union of Mind and Body.*

"*A Winter's Tale* is notably full of Bacon's observations on horticulture, hybridising, grafting, etc., and on the virtues of plants medicinal, and other matters connected with his notes on the *Regimen of Health.*

"*Cymbeline,* and *Antony and Cleopatra,* show him studying vivisection, and the

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effects of various poisons on the human body. The effects of mineral and vegetable poisons are also illustrated in *Hamlet,* and if these plays were written so early as some commentators suppose, then we may believe that certain portions were interpolated after Bacon's investigations into the great poisoning cases which he was, later on, called upon to conduct.

"*The Tempest* describes a wreck on the Bermudas, and Caliban, the man-monster or devil. It was published soon after the loss of the ship *Admiral,* in which Bacon had embarked money to aid Southampton, Pembroke, and Montgomery in the colonization of Virginia. The ship was wrecked on the Bermudas, the 'Isle of Devils.' About this time the *History of the Winds and of the Sailing of Ships* was said to be written.

"*Timon of Athens,* showing the folly of a large-hearted and over-generous patron in trusting to 'time's flies' and 'mouth-friends,' who desert him in the time of need, seems to have been written by Bacon after his fall and retirement, to satirize his own too sanguine trust in parasites, who lived upon him so long as he was prosperous, but who, on his reverse of fortune, deserted, and left him to the kindness of the few true friends and followers on whom he was absolutely dependent.

"*Henry VIII* completes the picture. In a letter from Bacon to the King, in 1622, he quotes (in the original draft) the words which Wolsey utters in the play of *Henry VIII,* iii, 454-457, though Bacon adds: 'My conscience says no such thing; for I know not but in serving you I have served God in one. But it may be if I had pleased men as I have pleased you, it would have been better with me.' This passage was cut out of the fair copy of the letter; its original idea appeared next year in the play of *Henry VIII.*" F. Bacon and His Secret Soc. (Pott), pp. 106-109.

BAGGAGE: And. Dic. 100; BAILMENTS; N. Y. R. R. v. Fraloff: 355: cases.

BAIL: Right to. Tayloe, Ex parte (1825), 5 Cow. 39, I Lead. Crim. Cas. (B. & H.) 228-260, ext. n.; 2 Kent, 13; Goans, Ex parte, 99 Mo. 193, 17 Am. St. 571, n.; Losasso, 15 Colo. 163, 10 L. R. A. 847, n.; Hudson v. Parker, 156 U. S. 277; Hughes' Proc.; Bouv. Dic.; And. Dic.; 9 Cyc. 9-155. Indemnified persons cannot become. U. S. v. Simmons, 47 Fed. Rep. 575, 14 L. R. A. 78, n. Bail may arrest and surrender principal. Reese v. U. S., 9 Wall. 13.

BAILEY v. BAILEY: (*Allegans,* etc.) L. C. 44.

BAILEY v. DE CRESPIGNY (1869), L. R. 4 Q. B. 180, Williston Sales, 15 Rul. Cas. 799, Bro. Max. 245, 246 (pleadings stated, and to these were interposed demurrer *ore tenus,* it seems), 2 Pars. Conts. 787, 1 Add. 327, 63 O. St. 514, 52 L. R. A. 869, Chit. Conts., Ans. Conts. 322, Beach Conts., 3 Suth. Dam. 655, 3 Kent, 468. See Dumpor's Case (conditions); Spencer's Case (covenants), Ans. Conts. 322, 393.

Impossibility; when a defense; construction of a statute, and of conditions in a bond and of pleadings. Bro. Max. 245, 246. See §§ 4, 70, 118, Hughes' Conts.; 9 Cyc. 625-627.

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It is absurd to require impossibilities. See ABSURDITIES; Suth. Dam. 37. Obligations are construed to except impossible things. Suth. Dam. 655, 709, 710.

Impossibility to perform a contract. Krause v. Board (1904), 162 Ind. —, 70 N. E. 264: cases (destruction of building before completion); Hallett v. Wylie: cases.

BAILEY v. HORNTHAL (1898), 154 N. Y. 648, 61 Am. St. 643, Hughes' Proc. Theory of the case controls the pleadings. Appellate review is controlled by theory of the case. Baker v. Barton.

BAILEY v. MAYOR OF NEW YORK (1842), 3 Hill 531, 2 Denio (1845), 433, 38 Am. Dec. 669, n., 2 Thomp. Neg. 652-673, ext. n., 1 Kinkead, Torts, 98, Shear. & Redf. Neg. 137, Wood, Nuis. 347, Mech. Pub. Off. 796, n.; Cahill v. Eastman; 4 Kent, 110, n., 2 Dill. Munic. Corp., 1 Beach, Gould, Waters, Mech., Sto., Whart., Agency; Chit., Pars., Conts.; Whart., Thomp., Neg.; Cool. Const. Lim.; 2 Kent, 275, 284; Busw. Pers. Inj. 58; Hughes' Proc.

Corporations: Liability for negligence. See Hill v. Boston; cases: *Respondeat superior;* Bartlett, L.C. 6; 1 Kinkead, Torts, 96-110.

Contractors doing public work under public authority are not liable. Beener v. Atlantic Dredging Co., 134 N. Y. 156, 30 Am. St. 649: cases; 17 L. R. A. 220 (blasting rocks at Hell Gate caused damage); Leicester Waterworks Co. v. Nuttall (1878), L. R. 4 Q. B. 18-24, 16 Rul. Cas. 681-691, n.: cases (assessors not liable if they act *bona fide*); Hay v. Cohoes Co.; 76 Am. St. 417.

BAILEY v. PHILADELPHIA (1895), 167 Pa. 569, 46 Am. St. 691: cases; Stapilton v. Stapleton.

Compromise as a consideration. § 122, Hughes, Conts.

BAILMENTS: Coggs, L.C. 350: cases; 5 Cyc. 161-223; Schouler, Bailments; Van Zile; Lawson; Story; §§ 124-127, Hughes, Conts.; Armory, *ante;* Bainbridge, L.C. 332.

BAINBRIDGE: L.C. 332. §§ 283, 284, Gr. & Rud.

BAKER v. BARTON (1891), 1 Colo. Ap. 183 (20 Colo. 505). Pleadings can be waived. Hume v. Robinson (Colo.): cases. *See* Bailey v. Hornthal. *Contra:* L.C. 15, 16.

BALDEY v. PARKER (what is acceptance and delivery; statute of frauds contract for several articles, in all exceeding $50 in value, sufficient), L.C. 337.

BANK NOTE: Passes on delivery. Miller v. Race; Tobey v. Barber: cases; Bouv. Dic.

BANKS: 15 Cyc. 431-615. Duties as collecting agents. Minneapolis Co. v. Bank (1899), 76 Minn. 609-629, ext. n.

When a bank does not take title to deposits. Plano Mfg. Co. v. Auld (1901), 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. 769-807, ext. n.

Savings, duties to depositors. Kelly v. Bk., 180 N. Y. 171, 105 Am. St. 720-729, ext. n.

State courts can not attach effects of national. Van Reed v. Bk., 173 N. Y. 314, 105 Am. St. 666 n.

BANK OF U. S. v. BANK OF WASHington. *See* MONEY HAD AND RECEIVED.

BANKRUPTCY: Brandenburg on. Promise to pay debt after discharge is upon a good consideration. Trueman.

Bankruptcy.—

Nature and effect. 3 Page, Conts., 1544-1568, 5 Cyc. 237-418; Forms. 2 Foster's Fed. Prac., 1489-1534.

BANNER, EX PARTE (Blythe, In re) (1881), L. R. 17 Ch. Div. 480. *See* FRAUD; *Fabula non judicium.*

BANTA v. SAVAGE (1877), 12 Nev. 151, 7 Mor. Min. Rep. 113. Denials must be certain. L.C. 34.

BAR: Pleas of. *See* ABATEMENT; Bouv. Dic.

BARBIER v. CONNOLLY (1884), 113 U. S. 27-32. McClain's Const. Cas. 925, And. Dic. 826; Macon v. Walker, 234 U. S. 311. *Cited,* § 5, Hughes' Proc.; §§ 268, 294, Gr. & Rud.

Police power of the states; extends to education, morals, comfort and well being. See MORALITY; PROTECTION; Millet; And. Am. Law, 457; S. v. Broadbelt (1899), 89 Md. 565, 73 Am. St. 201, n.; Rahrer, *In re;* Mugler; Austin; Fertilizing Co.; S. v. Zeno (1900), 79 Minn. 80, 79 Am. St. 422; P. *ex rel.* Armstrong v. Warden; *Evansville v. Miller,* municipal corp. powers.

BARKER v. BRAHAM (1773), 2 Wm. Bl. 866, 3 Wils. 368, Ball, Cas. Torts, 427, Bigl. L. C. Torts, 231, 13 Mews' E. C. L. 1444 (solicitor; liability); Weeks, Attys. 133. 1 Kinkead, Torts, 221 (attorney's liability for false imprisonment). § 239, Hughes' Proc. *See* ATTORNEYS.

BARKER v. PULLMAN: *Sub* Brown.

BARNARD v. CUSHING: L.C. 108.

BARR v. POST: L.C. 265.

BARRATRY: 2 Bish. Cr. Proc. 98-103; McClain, C. L. 29, 1169; 3 Gr. Ev. 66, 67; Weeks, Attys. 86. *See* CHAMPERTY; MAINTENANCE; Bouv.; And. Dic.; 5 Cyc. 617-620.

Contracts for, illegal. § 92, Hughes' Conts.

BARRETT v. WHITE (1825), 3 N. H. 210, 14 Am. Dec. 352, n.; *Six Carpenters' Case.*

BARRON v. BALTIMORE: L.C. 241.

BARROW v. HILL: L.C. 298.

BARRS v. JACKSON, *sub Res adjudicata.* Sto. Pl. 791. The record pleaded for *Res adjudicata* is equitably construed. And the point decided must be material and necessary. Mondel: L.C. 77; Greeley.

BARTEMEYER v. IOWA (1873), 18 Wall. (U. S.) 129, 13 Am. Law Reg. (N. S.) 220-230; Rhodes v. Iowa (1897), 170 U. S. 412 (regulating intoxicants); Leisey v. Hardin (1890), 135 U. S. 100; Boyd, Cas. Const. Law, 269; 2 Thayer, Const. Cas. 2104; 3 Inters. Com. Rep. 36, 10 S. C. Rep. 681; And. Dic. 825; Rahrer, *In re;* Austin (police power limitations).

Rights, privileges and immunities; what are. Include right to sue in the courts. Sub Mostyn. Blake (strict construction of 14th Amend.). Cronin v. Adams (1904), 192 U. S. 108 (may prohibit sale of liquor to women).

BARTHOLOMEW v. JACKSON: L.C. 302.

BARTLETT v. CROZIER: L.C. 6.

BARTLETT v. VINOR (OR VINER) (1706), Carth. 252; Smith, Conts. 251; Holman: L.C. 363; § 11, Hughes' Conts. (illegal contracts); Smith v. Mawhood. The rule in this case is quoted twice in Smith's Conts., at p. 18 n., and also p. 251, where it is stated fully; 1 Kent, 467. Same point, Vining v. Bricker (1863), 14 Ohio, 331; Bemis v. Becker (1862), 1 Kan. 226.

BASSETT v. JOHNSON (1839), 2 N. J. Eq. 154. Issue must appear from the pleadings. Avon; Aylesworth.

Bills of exceptions should be concise. Bassett. *See* BILL OF EXCEPTIONS; L.C. 290*a*.

BASSETT v. NOSWORTHY: L.C. 395.

BASTARD: Am. Crim. Law Repts.; And. Dic. Concealing birth of. McClain, C. L. 1152; 5 Cyc. 625-675; 2 Gr. Ev. 150-153.

BASTARDUS NON POTEST HABERE hæredum nisi de corpore suo legitime procreatum: A bastard can have no heir unless it be one lawfully begotten of his own body. See *Actio personalis*, etc.; Hughes' Proc. Robinson v. R. R.

BATES v. BULKLEY: L.C. 225.

BATTERY: Stephens; McClain, C. L.

BATTY v. CARSWELL (1806), 2 Johns. 48, 1 Am. L. C. 653-699, ext. n., Mech. 393; Sto. 165, 169; Huff., Reinh., Tiff., Ag.; Rand. Com. Paper, 359, 1 Danl. Nego. Insts. 291, Pars. N. & B., Chit. Conts., Bish., 2 Kent. *Cited*, § 303, Gr. & Rud.

Agency. The special agent does not bind the principal unless he acts within the power conferred. Authority to execute a note for six months will not authorize it for sixty days. Batty; Rossiter; Livingston.

Cox v. Midland R. R. Co. (1849), 3 Exch. 268, 1 Chit. Conts. 294, 20 L. R. A. 697, Sto. Agt. 69, Huffc., Reinh., Tiff.; 1 Pars. Conts. 47; Hanscom v. Minneapolis St. R. R. (1893), 53 Minn. 119, 20 L. R. A. 695, 700, n.; Cincinnati R. R. v. Davis (1840), 126 Ind. 99, 3 Am. R. R. & Corp. Rep. 435-437, n. (when general officers have power to contract for surgeons). §§ 186, 320, 322, Hughes' Proc.

In the Cox Case a station-master had no authority to employ a surgeon to amputate the leg of a passenger, injured by the railroad. *Omne majus continet in se minus* does not always apply here.

A principal is bound by the acts of a general agent. Rathburn v. Snow (1890), 123 N. Y. 343, 10 L. R. A. 355, n.; Jaques v. Todd (1829), 3 Wend. 83, 1 Am. Lead. Cas. 670-699, n.; Mech. Ag., Sto., Huff., Reinh., Tiff.; Pars. Conts., Bish.; Hubbard v. Tenbrook (1889), 124 Pa. 291, 10 Am. St. 385, 2 L. R. A. 823.

Private instructions do not affect third persons. One cannot create appearances and then dispute them. *Allegans contraria*, etc.; Whart. Ag. 40, 47, 125, 127, 256; Sto. 127.

Appointment to continuous service implies an authority to do any acts incident to such service. Whart. Ag. 40. And if the agent causes a loss, the principal, who first trusted him, should first suffer. Lickbarrow v. Mason, L.C. 394; Sto. Ag. 87-96; Mech. 279, 280.

Commercial paper; power to execute must be clear, necessary and positive. Jackson Co. v. Bank (1902), 199 Ill. 151, 93 Am. St. 113, n.

Corporations not bound by note of president and secretary unless the power to execute it was expressly conferred. City Ry. v. Bank, 62 Ark. 33, 54 Am. St. 282, 93 Am. St. 126, n.

BAUERMAN v. RADENIUS: L.C. 48.

BAWDY HOUSE: 2 Bish. Cr. Proc. 104-122; Bouv. Dic.

BAXTER v. PORTSMOUTH: L.C. 414.

BEARD v. HOPKINSVILLE (1894), 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222-243, ext. n., 23 L. R. A. 402, n., 29 Cent.

Beard.—

L. J. 344-352; cases, 2 Beach. Conts. 1170. *Cited*, §§ 178*a*, 179, 186, Hughes' Proc.

Constitutional law, limitations of indebtedness. No indebtedness can be incurred in violation of a constitution. Kelly v. Bemis. *See* Doon v. Cummins (1892), 142 U. S. 366, 5 Am. R. R. & Corp. Rep. 538; Dill. Munic. Corp. 130-137, 2 Beach, 816-904; Hedges v. Dixon County (1893), 150 U. S. 182, 9 Am. R. R. & Corp. Rep. 520-542, ext. n., 2 Beach, Conts. 11, 70; La Porte v. Gamewell Fire Alarm Tel. Co. (1896), 146 Ind. 466, 58 Am. St. 359, n.; Carter v. Thorson (1894), 5 So. Dak. 474, 49 Am. St. 893, n., 24 L. R. A. 734; Wilkes County v. Call (1898), 123 N. C. 308, 44 L. R. A. 252: cases; Decorah v. District Tp. of Doon (1892), 86 Ia. 330, 41 Am. St. 489, n.: cases.

The power to contract must exist; no recital will create it. Mercer County v. Hackett (1863), 1 Wall. (U. S.) 83: cases, 1 Dill. Munic. Corp. 486; L.C. 89. An authority must exist and also be pleaded. L.C. 4.

County may create indebtedness beyond limitations to carry on essential functions. Hull v. Ames (1901), 26 Wash. 272, 90 Am. St. 743, note; *Contra* cases; *Lex non exacte*, etc.; L.C. 216.

BEARDSLEY v. DOLGE: L.C. 13.

BEAUMONT v. REEVE: L.C. 367.

BEER CO. v. MASSACHUSETTS (1878), 97 U. S. 25, 24 L. ed. 989; Myer, Vested Rights, 584; Cummings, Priv. Corp. 533; And. Dic. 824; Prohibition; Tucker, Const.

Police power of the states. Slaughter-House Cases: Chicago, etc. R. R. v. Nebraska (1897), 170 U. S. 57: cases; Barbier.

BEES: Liability for. *See* ANIMALS.

BEHN v. BURNESS (1863), 3 B. & S. 715 (113 E. C. L. R.), 1 Lang. Cas. Conts. 556, 6 Rul. Cas. 492-563, n., 3 Am. Law Reg. 442, Chit. Conts., 2 Kent. 480, 3 id. 206, 282, 288. *See* Carter; Pasley: L.C. 375. Warranty of representations. *See* Carter; Pasley.

BELCHER v. CHAMBERS (1879), 53 Cal. 63. Same point, Needham v. Thayer: 261.

Due process of law a federal question, which a state court must respect.

BELKNAP v. SCHILD: L.C. 260.

BELL v. BROWN (1863), 22 Cal. 671-678, 5 Mor. Min. 240, Bliss, Pl. 344, n. (editor commends this case), 48 L. R. A. 177.

Repugnant, inconsistent defenses permissible. See *Allegans*; STATUTE OF ANN; L.C. 34; 96 Cal. 275, 31 Am. St. 271 (specific statements control general denial); Bliss, C. Pl. 122. Repugnant words are often fatal. L.C. 108. Pain, L.C. 107.

Every presumption is against a pleader. Dovaston. Bell v. Brown may be cited to oppose that maxim. It is a perplexing case; it is equivocal, and still it is commended. Bliss, Pl. 344, n. (3d ed.). *Cf.* pp. 8-17; § 4, Hughes' Proc.

False pleadings, if verified, are perjury. Bell v. Brown forbids them, but at the same time upholds false, sham, equivocal, negative, pregnant, argumentative and hypothetical pleadings. It makes "fish, flesh or fowl" of many rules. The best part of the case is Attorney Sanderson's brief, all of which the court rejected. Soon after

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he was called to preside over the court. (25-29 Cal. Reports.) Ejectment; pleadings in. Bell v. Brown; Aslin v. Parkin.

The several causes of action must be separately stated. L.C. 101; Bliss, Pl. 119, 346.

BELL v. CULPEPPER (1836), 2 Dev. & B. (N. C.) 19; L.C. 34.

BELL v. MORRISON: *See* LIMITATIONS.

BELL v. TWILIGHT (1846), 18 N. H. 159, 45 Am. Dec. 367, 2 Pars. Conts. 917; Bish. Conts. 277, 2 Pom. Eq., Devlin, Deeds, 1 Wash. R. P. 77, 2 id. 77, 3 id. 339. Note to Kingston's Case: 2 Sm. Lead. Cas. (8th ed.), 4 Kent, 261. *Cited,* § 331, Hughes' Proc.; § 308, Gr. & Rud.

Notice; possession, bona fide purchaser. Possession taken under one right is not notice of a changed or altered estate.

See 129 Pa. 337, 16 L. R. A. 207, 1 Sug. Vend. 22 (6th ed.); Daniel v. Davison (1809), 16 Ves. Jr. 249. *When a condition or state of being is once shown to exist it is presumed to continue until the contrary is shown.* Continuity is presumed. Carotti v. S., L.C. 179.

Whenever an innocent purchaser for value becomes a link in the chain of title, the doctrine of notice no longer applies. Demarest v. Wynkoop, 3 Johns. Ch. 147, 8 Am. Dec. 467, Bisph. Eq. 264. An exception to this rule exists when a transfer is made to an original party to the fraud. He never can be clothed with the rights of an innocent purchaser; but other persons with notice may be. Benj. Chal. Dig. Bills & N. 87, 2 Pom. Eq. 754; Bigl. Fraud, 306, 307; Henderson's Distilled Spirits (1871), 14 Wall. (U. S.) 44.

There must be but one contract to which acts or part performance can refer. 2 Reed, Stat. Fr. 585; Wills v. Stradling (1797), 3 Ves. Jr. 378, 381, 30 Eng. Rep. 1063; Browne, Stat. Fr. 476-479, 53 Am. Dec. 541, n., 2 Lead. Eq. Cas. 180-200 (4th ed.).

Possession to give notice must be open, notorious, continued and unequivocal. Bell v. Twilight; Williamson v. Brown; 2 Pom. Eq. 616; Twyne's Case; Lester v. Foxcroft, L.C. 341; Christy v. Barnhart, 53 Am. Dec. 538, n. See *Assignatus utitur,* etc.

BENDERNAGLE v. COCKS: *See* RES ADJUDICATA; SPLITTING CAUSES.

BENEDICTA EST EXPOSITIO QUANDO res redimitur a destructione: Blessed is the exposition when the thing is saved from destruction. *Ut res magis valeat,* etc., *In facto quod se habet,* etc.; *Interpretatio,* etc.; *Maledicta corrumpit textum; Viperina est expositio quæ corrodit viscera textus. Glossa.* Crooker. *Cited,* §§ 102, 123, 136-152, 191, Gr. & Rud.

Codes should be construed for the welfare and perpetuity of government. L.C. 219-225.

BENIGNE FACIENDÆ SUNT INTERpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentione non e contra debent inservire: A liberal construction should be put upon written instruments, so as to uphold them if possible and carry into effect the intention of the parties. See *Ut res magis,* etc.; Bro. Max. 540-576;

Benigne.—
Roe v. Tranmarr; Crooker; Mitchel: 372; Mallan v. May: 373; Wain: 335; Harper: 218; Kemble: 391; Ellis: 389; Bronson: 238; Dumpor's Case; Neilson; Boydell; Jackson; M'Culloch: 147.

Absurdities are excluded if possible. Effect is given all compacts if compatible with the language used. Construction will give sense and effect if possible. Absurdities are rejected.

BENNETT v. LOCKWOOD: *See* Hadley: cases.

BENTLEY v. VILMONT (OR VILMONT v. Bentley) (1887), 12 App. Cas. 471, Benj. Sales, 2 Bish. Cr. Proc. 198. *Cf.* Moyce v. Newington (1878), 4 Q. B. Div. 22, 14 Cox, C. C. 182.

Cited, § 139, Hughes' Conts. § 184, 331, Hughes' Proc. § 389, Gr. & Rud.

Title to stolen property; restoration on conviction. Sale by a thief conveys no title. Upon conviction of a thief, property stolen by him is given to its owner. Title to, from a thief. Cochran v. Bank, 207 Pa. 34, 103 Am. St. 976-988. *Crimen omnia,* etc.

Bentley; 1 Benj. Sales, 6-33, n., 2 Kent, 324; Walker v. Matthews (1881), 8 L. R. Q. B. Div. 109, 21 Am. Law Reg. 574, n.

A wrong-doer delivering goods for carriage to a common carrier can confer no rights, can give no lien against the owner. 1 Pars. Conts. 252; Lickbarrow; or to an innkeeper. Manning v. Hollenbeck (1870), 27 Wis. 202. *Cf.* Cook v. Kane (1886), 13 Or. 482, 57 Am. Rep. 28, n.

Nemo dat quod non habet. 1 Mech. Sales, 155; 1 Benj. Sales, 6; *Cujus est dare ejus est disponere.*

An innkeeper may acquire lien to stolen property from thief. York v. Greenough, Ld. Raym. 866; Threfall v. Borwick (1875), L. R. 10 Q. B. 210, 57 Am. Rep. 30, 13 Rul. Cas. 336. *See* Calye's Case: 356.

Auctioneers liable for selling goods of another; they must have some other defense than that of good faith or ignorance. Robinson v. Bird (1893), 158 Mass. 357, 35 Am. St. 495, n., Bro. Max. 802.

Sale of furniture with a secret drawer containing money gives no right to the money. Bro. Max. 807. *See* MISTAKE.

Caveat emptor is the rule applied to one buying of a trespasser. Omaha v. Tabor, 13 Colo. 41, 16 Am. St. 185, n., 5 L. R. A. 236.

Clothing one with indicia of ownership enables him to pass title. 1 Wat. Tres. 409, 410. *Allegans contraria,* etc.; Saltus v. Everett (1838), 20 Wend. 267, 32 Am. Dec. 541, Adams, Sales, 627; Williston, Sales, 452, 2 Kent, 326, 1 Mech. Sales, 153, Huffc., Reinh., Tiff., Ag., Leake, Conts. 398 (2d ed.); 1 Whart. Conts. 391, 182 N. Y. 47, 70 L. R. A. 787-796. *Contra:* Romeo v. Martulli (1899), 47 L. R. A. 601: cases.

Lost property gives no rights to a finder against the owner. Knox v. Eden Musee (1896), 148 N. Y. 441, 31 L. R. A. 779; Cyc. (lost property); 70 L. R. A. 787.

All dealing with stolen property are joint trespassers. Hilberry v. Hatton; Kirkwood.

Restitution of stolen property. Bentley.

One cannot sell what he does not possess. A

Bentley.—
thief can give no title. § 139, Hughes' Conts.; Hilberry v. Hatton (1864), 2 H. & C. 822, 24 Am. St. 812; Huffc., Tiff., Ag.; 2 Kent 616, 1 Mech. Sales 154-170, Bouv. Dic.

Judgment for conversion will not operate to pass title, unless it is satisfied. Miller v. Hyde.

Innocent purchaser liable for what he got. Jewett v. Dringer; U. S. v. R. R. (1904), 192 U. S. 524.

Lessee of piano to one having a retail store of pianos, etc., does not stop himself from following his property and reclaiming it. Oliver Co., 181 Mass. 455, 92 Am. St. 424, 57 L. R. A. 289, n.; Lowe v. Moore (1903), — Tex. — (who is a *bona fide* purchaser). *Contra* cases, *Nemo dat.* *See* CONVERSION; Miller v. Hyde.

BENTON COUNTY v. MORGAN (1901), 163 Mo. 661-679.

Sheriff's sale must be warranted and authorized by law; sufficient and valid process must first have been delivered to him; without this his sale is void. *Id.* 675-676; Blair: 170.

"What ought to be of record must be proved by record, and by the right record."

Exception to overruling a general demurrer is unnecessary; error as to that saves itself; such error will keep. *Id.* 670; Guedel; Slacum; Mallinckrodt: 12*a*; Beaumont: 367; McAllister: 3.

The statement of a cause of action is indispensable and it cannot be waived; the court may *sua sponte* notice the defect. *Id.* 678: Cases; citing Sto. Pl. 10, 473; Humphreys, 98 Mo. 542; Trimble, 112 Ind. 307; Bowman (Ill.).

Equity will not aid where there is a plain and adequate remedy at law. Sto. Pl. 473: cases.

BERDELL v. BISSELL (1882), 6 Colo. 162, 164. Hume: cases; Hughes' Proc.

BEST EVIDENCE: The best evidence of which a case in its nature is susceptible shall be produced, is a primary rule of evidence. 1 Gr. Ev. 82-97; 1 Whart. Ev. 60-76; 1 Ell. Ev. 215-219. It includes the 14th conserving principle already stated, namely, "what ought to be of record must be proved by record, and by the right record." § 104 Gr. & Rud. This should be considered in relation to the maxim *Expressio unius*, etc., also cognate cases: Windsor: 1; L.C. 46, 60, 266, 118, 127, 183 (cases and rules); Stanley County v. Snuggs (1897), 121 N. C. 394, 39 L. R. A. 439: cases; 180 U. S. 33, 471, 533. §§ 315-319, Hughes' Proc.

Cited §§ 59, 85-91, 104, 118, 125, 132, 133, 224, 272, Gr. & Rud.; 1 Ell. Ev. 205-219. *See.* Aylesworth: cases.

Of legislative enactments. Suth. Stats. 27-41.

See EVIDENCE; ORAL EVIDENCE; *Res Adjudicata*; DUE PROCESS OF LAW RECORD; BILL OF EXCEPTIONS; CERTAINTY.

Best evidence is competent evidence and that which agrees with the allegations. L.C. 135: cases.

Irrelevant evidence, if admitted, is surplusage. *Utile per inutile*, etc.; *Actore*, etc.

It need not be excepted so. L.C. 291, 290*b*. *See* CONVENIENCE.

No amendment of the pleadings to correspond with incompetent evidence should be permitted so as to affect the conserving principles of procedure. *See* CONSTRUCTIVE NOTICE; *Quod ab initio*, etc. Adams v. Gill (Ill.), *ante*; AMENDMENTS.

BEVERLEY'S CASE: L.C. 416.

BICKERDIKE v. BOLLMAN (1786), 1 T. R. (D. & E.) 405, 2 Gr. Ev. 195, 2 Kent 109, Bro. Max. 701, Rand. Com. Pap., Danl. Nego. Insts.; Smith, Lead. Cas.

Cited, §§ 303, 305, 323, Hughes' Proc.

Commercial paper; notice of dishonor is sometimes necessary. Notice is never required where it would be of no avail. *Lex neminem*, etc. Lent. *See* GUARANTY; *Idem est scire*, etc.

BICYCLE: *Entitled to rights of the road.* *See* Holland v. Bartch, *sub* King v. R. R., L.C. 205; 195 Pa. 190, 78 Am. St. 806; 20 R. I. 391, 78 Am. St. 881 (collisions with). Bouv. Dic.; And. Dic.

Rights of upon the road. Clemonson.

BIGAMY: *See* C. v. Mash. Civil action against bigamist for seduction. 5 Cyc. 688-704.

BILLARD v. S.: L.C. 189.

BILLINGS v. ACCIDENT INS. CO. (1891), 69 Vt. 78, 33 Am. St. 913, n., 17 L. R. A. 89, n.

Suicide of assured person excuses underwriter. Mutual, 56 Kan. 765, 35 L. R. A. 258-267, ext. n.; Fidelity, 93 Va. 138, 40 L. R. A. 432-452, ext. n.; Breasted, 8 N. Y. 299, 59 Am. Dec. 482-497, ext. n.; Fitch, 59 N. Y. 557, 5 Bigl. Ins. Cas. 316, 17 Am. Rep. 372; Penfold, 85 N. Y. 317, 39 Am. Rep. 860; Schultz, 49 Ohio St. 217, 48 Am. Rep. 676.

Underwriters are not liable for injuries inflicted by the assured. Connecticut Mut. Life Ins. Co. v. Akens (1893), 150 U. S. 468.

Self-destruction as a defense to life insurance. Supreme Conclave, etc., v. Miles (1901), 92 Md. 613, 84 Am. St. 528-555, ext. n.; Campbell v. Supreme Conclave (1901), 66 N. J. 274, 54 L. R. A. 576, n.: cases. *Non hæc in fœdera veni; Expressio unius*, etc. *Volenti*, etc. *Nullus commodum*, etc.

BILL OF EXCEPTIONS: *See* STATUTORY RECORD.

This record was first provided for by statute in A. D. 1286. Its sole use is to serve an appellant in a court of errors. It is a secondary or a conditional record, wholly dependent upon: 1. The mandatory record, and 2. The assignment of errors, and often upon the brief or argument. *See* APPELLATE PROCEDURE; ASSIGNMENT OF ERROR; ABATEMENT. Its function is to present "exception matter," and not the matter of the mandatory record. By the latter alone a cause may be removed into an appellate court for review, and it may be reviewed thereon without regard to assignment of error or argument and brief description of error. Windsor: 1; Roden: 12*b*. But a cause cannot be removed into a court of errors upon the statutory record alone; however, in those courts that waive pleadings and records this is done. Hume (Colo.); see THEORY OF THE CASE; see Hughes' Proc.; 3 Cyc. 1-499, §§ 63, 101, 224, Gr. & Rud. The statutory record will not support *res adjudicata*. §§ 175, 224, 235 *id.*; nor aid the mandatory record. § 238 *id.*; it is surplusage without an assignment of errors. § 53 (Convenience); *see* §§ 83-123, *id.*

The statutory record is a creation of statute and is governed by the statute, but it is otherwise with the mandatory record, which supports the conserving principles of procedure. §§ 83-123, Gr. & Rud. These conserving principles rest on nothing less

Bill of Exceptions.—
than a prescriptive constitution. Indianapolis: 223; § 53 *id.* (Convenience); Campbell v. Greer: 2*a* (Mo.); S. *ex rel.* Henson v. Sheppard (Mo.).

The exception matter of the exceptions record is much affected at four stages: And 1, at the time it is introduced, where it calls for apt objection and exception. *Consensus tollit errorem;* 2, at the stage of asking for a new trial; 3, the assignment of error; 4, at the stage of argument. At all of these stages formal precision and certainty are required, also, the utmost good faith and persistent insistence upon error. Kraner: 299; *Allegans contraria non est audiendus.*

Important rules relating to. Hughes' Proc.; L.C. 154, 290*a*-296, 299. § 53 Gr. & Rud. The following cases relate to the statutory record: L.C. 146, 153, 154, 157, 158, 217, 225, 271, 290*a*, 294, 295, 296, 299; Bassett; Delamar; Hake; Planing: 2*d*; Windsor: 1; Winona.

"What ought to be of record must be proved by record and by the right record." § 104 *id.* What this conserving principle means is a first precept for the practitioner and one which he must master. The records involved regulate all forensic proceedings; they lie at the base. Commingling and jumbling the mandatory and the statutory records will destroy all certainty in the due administration of the laws. This will appear from a careful consideration of §§ 83-123, Gr. & Rud.

The statutory record must ever be construed for the purposes for which it was created. Verba intentione; Expressio unius; Planing; 3 Cyc. 34.

Bill is exclusive; affidavits cannot vary. Johnson v. P., 33 Colo. 224, 108 Am. St. 85. Facts not stated are excluded. Bouv. Dic.; *De non; Expressio unius; Verba fortius.* Effect of; conclusiveness of. Bouv. Dic.

Are construed against the appellant. Verba fortius; 3 Cyc. 30: cases; 179 Ill. 203; see 109 Mo. 537. Forms of. Fost. Fed. Prac. 1322, 1326; 84 Am. St. 284. Admissibility as evidence. 3 Wigm. Ev. 1668.

BILLS AND NOTES: *See* COMMERCIAL PAPER; NEGOTIABLE INSTRUMENTS.

BILLS IN EQUITY: Must be perfect and sufficient in itself. Subsequent pleadings will not aid an indictment or a bill in equity. Codes follow this analogy. Sturges: 111; Sto. Pl. § 10; Bouv. Dic.; And. Dic.

BILLS OF DISCOVERY: Gargill v. Kountz (1893), 86 Tex. 386, 24 L. R. A. 183-195, ext. n., 2 Beach, Eq. 855-872, 9 Rul. Cas. 513-600: cases, 6 Encyc. Pl. & Pr. 728-818, 8 *id.* 36-69. Bouv. Dic.

Discovery was allowed and was strictly enforced in equity both as a duty, right (Graver v. Faurot), and also to save expense. Sto. Eq. Pl. 845.

BILLS OF LADING: Lickbarrow v. Mason: 334; Bouv. Dic.

Limitation of carriers' liability by. Railway v. Lockwood: 352; 88 Am. St. 68-134, ext. n.

iability of assignee. National Bk. v. R. R. (1904), 99 Md. 661, 105 Am. St. 321-375, ext. n.

BILLS OF PARTICULARS: Defined, Tidewater, 105 Va. 160, 115 Am. St. 864;

Bills of Particulars.—
Cryps v. Baynton; McDonald v. P. *See Expressio unius,* etc. Prolixity. R. v. Esdaile; 2 Bouv. Dic. 577 (particular statement); 1 Bish. Crim. Proc. 643-646; Kelley v. P. (1901), 102 Ill. 119, 85 Am. St. 323, 7 Am. Crim. Law Rep. 137; § 196, Hughes' Proc.

Court may order pleadings made more specific. Rosen v. U. S. (1895), 161 U. S. 29, 40 L. R. A. 606; McCoy v. Oldham (1891), 1 Ind. Ap. 373, 50 Am. St. 208, n. And defenses in libel suits. C. v. Snelling, McClain, C. L. 976 (conspiracy). Limit proof. S. v. Van Pelt, 136 N. C. 633, 68 L. R. A. 760-766.

BILLS OF PEACE: Woodward v. Seeley (1847), 11 Ill. 157, 50 Am. Dec. 445-454, n.; 1 Pom. Eq. 246; 2 Sto. Eq. 854-859; *Interest reipublicæ,* etc.; 3 Encyc. Pl. & Pr. 550-568.

A multiplicity of suits is to be avoided. Brugger: 162; 1 Pom. Eq. 243-275; L.C. 264.

Circuity of action is to be avoided. Set-off and counterclaim procedure rests on this idea. *Interest reipublicæ,* etc.

BILLS OF REVIEW: Jackson v. Id. (1893), 114 Ill. 274, 36 Am. St. 437, n.; Brewer v. Bowman (1830), 3 J. J. Marsh 492, 20 Am. Dec. 158-175, ext. n.; Wood, 59 Ark. 441, 43 Am. St. 42, 3 Encyc. Pl. & Pr. 569-598; Adler v. Van Kirk Co. (1896), 114 Ala. 551, 62 Am. St. 133; Crowns; Watkinson (N. J.), 69 L. R. A. 397, n.

BIRD v. HOLBROOK (1828), 4 Bing. 629 (13 E. C. L. R.), 1 M. & P. 607, 25 Ru.. Cas. 97, 29 R. R. 657; *cited* §§ 294, 296, Gr. & Rud.; Shear. & Redf. Neg., Wood, Nuis., Bro. Max. 388, Bigl. L. C. Torts; 145 N. Y. 308, 36 Am. St. 814, 45 Am. St. 619, 29 L. R. A. 161, Cool. Torts, Bish. Torts, Whart. Neg.; 1 Add. Torts 226. Busw. Pers. Inj., 10 Mews' E. C. L. 213, 6 Jac. Fish. Dig. 9524, Thomp. Neg., 1 Bish. C. L. 355 (nuisance—spring guns). *Cited* § 348, Hughes' Proc.

One stealing a fowl, if injured by a spring gun, may recover. Defense against trespassers must not be excessive. 25 Rul. Cas. 88; Bro. Max. 268, 388. *Contra* if a trespasser knows the guns are there. *Volenti non fit injuria;* S. v. Barr (1895), 11 Wash. 481, 39 L. R. A. 154-163, ext. n.; Hooker v. Miller (1873), 37 Iowa 613, 18 Am. Rep. 18-21; 1 Wat. Tres. 166, 2 *id.* 845, 868 (a trespasser may recover).

Killing by instruments of defense to prevent crime. 1 Bish. C. L. 354-357, Cool. Torts 194. *Savage dogs.* Loomis. *See* DOGS. *Inviting an injury.* Barnott v. Wright (1887), 45 Ohio St. 177, Burdick's Torts 132. *Trespasser's right to resist and to kill.* Taylor v. Cole, 93 Am. St. 254-260, ext. n. *Self-defense:* right to employ. Aldrich; U. S. v. Holmes: cases.

BIRKMYR v. DARNELL: L.C. 339.

BISSELL v. SPRING VALLEY TOWNship: L.C. 42. Pleading; effect of as evidence. Boileau v. Rutlin: 43.

BLACKETT v. ROYAL EXCHANGE ASsurance Co.: L.C. 400.

BLACKLISTING: 3 Page Conts. 1338.

BLACKMAIL: Bouv. Dic., 8 Am. Crim. Rep. 110. *See* COMPOUNDING OFFENSES.

BLACKSTONE: And. Dic. 123, 124; Encyc. Brit. (Blackstone); And. Am. Law. §§ 11-14, Gr. & Rud.

Did not understand equity. Preface, 1 Pom. Eq., § 254. *See* EQUITY MAXIMS.

BLAIR v. READING: L.C. 170.

BLAIR v. RIDGLEY: L.C. 254.

BLAKE v. McCLUNG (1898), 172 U. S. 239, 2 Tucker, Const. 627, 857 (limitations on states). 201 U. S. 255.
Cited, pp. 12, 17, 34, 41; §§ 1, 13, 17, 31, 46, 49, 204, Hughes' Proc.; §§ 89, 96, 108, 109, 118, 122, 132, 144, 148, 164, 198, 200, 201*a*, 204, 239, 246, Gr. & Rud.
Virginia corporation excluded from assets of an English corporation doing business in Tennessee. It was not within the jurisdiction thereof.
Foreign corporations must comply with conditions before doing business in a state. 49 L. R. A. 419; Kirven.
Statute can not condition against removal into federal courts. "No statute limitation of suability can defeat a jurisdiction given by the constitution"; pp. 255, 256, Hughes' Proc.: cases. *In præsentia.* Contra: 191 U. S. 288. *See* 191 U. S. 373.
Every word and clause must be given effect to. In pari; Concordare leges legibus, etc. *Statute may be valid in part and void in part.* Spraigue: 231.
BLANK: Filling of, in commercial paper. Master; Hibblewhite.
BLASPHEMY: 2 Bish. Cr. Proc. 123-125; 3 Gr. Ev. 68-70; Bouv. Dic.; And. Dic. 5 Cyc. 710-716.
BLASTING ROCK: Negligence. *See* Hay.
BLISS, PLEADINGS: *See* CODES.
BLITZ v. S. (1894), 153 U. S. 308, 38 L. ed. 725, 16 Crim. Law Mag. 109. Motion for new trial; when necessary in federal courts. *See* NEW TRIAL. One count; reference from one to another allowable to avoid prolixity. *Verba relata.*
BLOOD v. LIGHT (1866), 31 Cal. 115. Dickson v. Cole: 34.
BLOOM v. BURDICK: L.C. 266.
BLOOM v. RICHARDS (1853), 2 Ohio St. 287. *Sunday laws depend on a statute.* At common law, only *Dies dominicus non est juridicus* (Sunday is not a day for judicial or legal proceedings) existed. L.C. 174. *See* LORD'S DAY; Crepps: 113; § 111, Hughes' Conts.
BLOW HOT AND COLD: See *Allegans*, etc.
BLYTH v. BIRMINGHAM WATER-works Co. (1856), 11 Exch. 781. *Cited* §§ 69, 291, 296, Gr. & Rud. 4 Am. Law Reg. (N. S.) 570, 18 Rul. Cas. 621, n.; Ames, Torts, 130; Wood, Nuis. 115; Shear. & Redf. Neg. 6, 510, 36 Am. St. 538; Cool. Torts; Bish.; 2 Dill. Munic. Corp.; note to Ashby, 1 Sm. Lead. Cas. 502; 36 Am. St. 838; 192 U. S. 450. *Cited*, § 347, Hughes' Conts.
Torts. A lawful act concurring with an unforeseen event is not an actionable tort. Nichols; Fletcher.
Tort defined: Failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done. Blyth Case; Baltimore R. R. v. Jones (1877), 95 U. S. 441 (24 L. ed. 506); Bro. Max. 368. *See* TORTS; Preface, Hughes' Conts.; Missouri K. & T. R. R. v. Wood; U. P. R. R. v. Cappier; *Volenti.*
BOBEL v. P.: L.C. 250.
BOCK v. PERKINS (1890), 139 U. S. 628-648.
Causes arising under the laws of the United States; what are. Suits against a marshal arising from the discharge of his duties is. 139 U. S. 630; Buck v. Colbath, *sub* Freeman v. Howe: 287. *See* FEDERAL QUESTION.
BODY STEALING: 8 Am. Crim. Rep. 100.
BOERING v. STREET RY. (1904), 193 U. S. 442. *Cited*, p. 39.
BOGGS v. MERCED MINING CO. (1859), 15 Cal. 279, Blanch. & Week's Lead. Cas. Mines, etc., 130-173, n., 10 Mor. Min. Rep. 334.
Mineral lands of the United States; rights to, how established and maintained. Boggs Case; 3 Wash. R. P. 188, 198, 394; Fitzgerald v. Clark (1895), 17 Mont. 100, 52 Am. St. 665-693, ext. n. (review of cases), 30 L. R. A. 803: Catron v. Old (1897), 23 Colo. 433, 58 Am. St. 256-280, ext. n. (patents to mineral lands: extraterritorial rights); Castillero v. U. S. (1862), 2 Black (U. S.), 1-371 (17 L. ed. 360-448, n.), 17 Rul. Cas. 393, 394. *Location of.* Dwinnell, 145 Calif. 12, 7 L. R. A (N. S.) 763-889, ext. n.
Relocation of forfeited and abandoned claims. 29 Mont. 470, 68 L. R. A. 833-848, ext. n. *See* Hughes' Proc.
BOILEAU v. BUTLIN: L.C. 43.
BONA FIDE POSSESSOR FACIT FRUC-tus consumptos suos: By good faith a possessor makes the fruits consumed his own. Trayner, Max. 57.
BONA FIDE PURCHASERS: Lickbarrow; Le Neve; Bassett: L.C. 394-396; Swift; Miller v. Race. *See* §§ 288, 290, 307, Gr. & Rud.
Equities of, under judicial proceedings; fraud will vitiate. L.C. 51.
Right of, in equity. Bassett; Le Neve; 2 Lead. Eq. Cas. 1-228.
Of real estate. Le Neve; 21 Rul. Cas. 702-847.
Patent to a fictitious person absolutely void. Moffatt v. U. S. (1884), 112 U. S. 24; Graver.
Purchaser of lands by judgment creditor at his own sale is not. Hacker v. White (1900), 22 Wash. 415, 79 Am. St. 945.
Of commercial paper. Miller v. Race; Smith, Lead. Cas.; Swift v. Tyson, 2 Cyc. 924-959.
Gives good title to his transferee, who may have notice, if not a former party. De Marest v. Wynkoop (1817), 3 Johns. Ch. 147, 8 Am. Dec. 467, Bisph. Eq. 264; Bell v. Twilight, *ante.*
BONAPARTE v. R. R.: L.C. 278.
BONDS: Attachment, injunctions, replevin and official; liability. Trapnall v. McAfee. *See* APPEAL BONDS; Blair v. Reading; Bouv. Dic.; And. Dic.; 5 Cyc. 729-857.
Penalty as limit of liability on statutory bond. Griffith v. Rundle (1900), 23 Wash. 453, 55 L. R. A. 381-396, ext. n. Form of judgment on penal bonds. Burnside v. Ward (1903), 170 Mo. 531, 62 L. R. A. 427-473, ext. n.
BONESTEEL v. ORVIS: L.C. 151.
BONI JUDICIS EST AMPLIARE JURIS-dictionem: It is the duty of a judge when requisite to amplify the limits of his jurisdiction. Bro. Max. 79-84; Penn, *sub* Mostyn; Hauswirth v. Sullivan; And. Dic. 574; Schofield v. Ry., *sub* Mostyn; The Genesee Chief; Heydon's Case; Milligan's Case; *Lex non exacte*, etc.; *Casus omissus:* Fisher v. McGirr; Dority; Whitney v. Dick.
Courts should favor remedies (Chisholm),

Boni.—

and even concurrent remedies; but instances of the opposite are found. The code provision for supplementary proceedings is often held an abolition of a creditor's bill. *Lathrop v. Clap* (1869), 40 N. Y. 328, 100 Am. Dec. 493-515, ext. n. Also the right to sue on a judgment, by a provision for the revival of a judgment in the court that first entered it. Hood, 11 Colo. 106, 109. *Contra:* Hummer (successive actions may be brought on a judgment). Set-offs should be favored. *See* SET-OFFS; MULTIPLICITY OF SUITS.

Jurisdiction; limitations are strictly construed. Walker v. Turner; Milligan's Case.

Right to sue on an injunction bond is complete when it is dissolved (*see* Trapnall: cases), and many courts so hold. But the right to sue immediately is denied. Kilpatrick v. Haley (1895), 6 Colo. Ap. 407.

Cases like the foregoing are not pervaded with the spirit of *Boni judicis*, etc. Dash.

Equivalent remedies given by codes do not abrogate former remedies. 153 Ind. 5. Statutes in derogation of the common law are strictly construed. *See* Kollock Case; § 28, Hughes' Proc.

Claims for the contrary involve a consideration of limitations of legislative power. Indianapolis v. Horst: 223; O'Connell v. Reed: 224.

Code cases affirm the principal maxim. Kollock; Crowns (instructive discussions by Marshall, J., of Wisconsin): Liberal construction to make code exclusive and effectual. Bliss, Pl. 141. Codes should not be construed hostile and inimical to the conserving principles of procedure. End. Stat. 182.

BONNELL v. WILDER: L.C. 185.

BONUM NECESSARIUM EXTRA TERminos necessitatis non est bonum: A thing good from necessity is not good beyond the limits of the necessity. A way of necessity ends with the necessity; also the rights of self-defense. C. v. Selfridge. Eminent domain is from necessity and ends with it. *See* NECESSITY.

BONUS JUDEX SECUNDUM ÆQUM ET bonum judicat, et æquitatem stricto juri præfert: A good judge decides according to justice and right, and prefers equity to strict law. Coke, Litt. 24; 4 T. R. 344; 2 Q. B. 837; Bro. Max. 77. *Lex non exacte*, etc. S. *ex rel.* Henson v. Sheppard.

BOOKS: As evidence; scientific books. U. P. R. R. v. Yates (1897), 49 U. S. Ap. 241, 79 Fed. Rep. 584, 25 C. C. A. 103, 40 L. R. A. 553-577, ext. n.; Western, etc., Co. v. Mohilman Co. (1897), 51 U. S. Ap. 577, 83 Fed. Rep. 811, 40 L. R. A. 561, ext. n.; Bouv. Dic.; And. Dic. Stockholders' rights to inspect corporate books. Weihenmayer v. Bitner (1898), 88 Md. 325, 45 L. R. A. 456-475, ext. n. *Books of account.* As evidence. Price v. Torrington: 213.

BORDEN v. FITCH: L.C. 267.

BORKENHAGEN v. PASCHEN (*Probata* will not supply *allegata;* Defenses not pleaded are waived. Evidence is inadmissible without *allegata.* Shutte v. Thompson; Sounderson v. Herman; *Frustra probatur quod probatum non relevat*), L.C. 81.

BOSTON ICE CO. v. POTTER: L.C. 320.

BOSTON R. R. v. BARTLETT: L.C. 331.

BOSTWICK v. STILES (1865), 35 Conn. 195.

Statement of case: B., a mortgagor, by decree was ordered to pay the mortgage debt by a certain day. For this he had arranged with a willing and able uncle, and to this he looked forward with confidence; but a revulsion in business brought only disappointment and the sale took place. This B. caused to be reopened, the facts constituting an accident. *Forfeitures are odious.* Kemble: 391.

Accidents; loss of documents; Equity will relieve against. Lawrence v. Lawrence (1860), 42 N. H. 109; 2 Pom. Eq. 831.

Forfeitures; equity will relieve against. Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. 657, n. Jurisdiction of equity in cases of. 1 Beach, Eq. 25-34, 9 Am. Law Reg. 449; 1 Sto. Eq. 75-109.

Both law and equity favor the diligent creditor. 12 Tex. Civ. App. 136. *Vigilantibus*, etc.; *Qui prior est tempore*, etc.

BOUNDARIES: 5 Cyc. 867-974.

BOUNTIES: 5 Cyc. 977-992.

BOWLUS v. PHOENIX INS. CO.: L.C. 100.

BOWMAN v. P. (1885), 114 Ill. 474; § 56, Gr. & Rud.

Pleading; omission of material allegation; aider by verdict. R. v. Goldsmith (rule stated). Omitting a material fact is ground for motion in arrest. Pleadings cannot be waived. Bartlett: 6 and Williams: 7, cited. S. P. Rushton; Moore v. C.; U. S. v. Cruikshank; Slacum; Hitchcock v. Haight: 12; Benton.

General issue cures defective allegations. Illinois Co. v. Hanson (1902), 195 Ill. 106. *See* Rice v. Travis, Brown v. City. It estops. C. & N. W. R. R. v. Goebel (1887), 119 Ill. 515, 521; Dorn v. Farr.

Every presumption is against a pleader on general demurrer. After that they are in his favor. Sargent Co. v. Baublis (1905), 215 Ill. 428; citing, 1 Chit. Pl. 673, Gould's Pl. 463. *See* Spieres v. Parker, *sub* Rushton; cited, 1 Gr. Ev.; Gerke v. Fancher (1895), 158 Ill. 375; *cites* Gould 463; 1 Chit. 712, 713; Harrow v. Grogan. See Franklin Union No. 4 v. P. 220 Ill., 110 Am. St., 4 L. R. A. (N. S.) (Pleadings immaterial.)

BOYCOTT: *See* CONSPIRACY; Lumley; 56 L. R. A. 804; Marx, etc. Co. v. Watson (1902), 168 Mo. 133, 90 Am. St. 440, n.; 56 L. R. A. 951: cases (equity will restrain); 2 McClain, C. L. 963, n. May be enjoined. Gray; 9 Minn. 171, 103 Am. St. 477-503; My Maryland Lodge, 68 L. R. A. 725-760; Washington Co., 29 Utah 108, 110 Am. St. 666-686, ext. n.

BOYD v. BLANKMAN (Aider): L.C. 62.

BOYDELL v. DRUMMOND (1809), 11 East 184, 10 R. R. 450; Benj. Sales 230; 3 Pars. Conts. 40, 41; 1 Chit. 96, Ans. 56, stated in Birkmyr; Bracegirdle v. Heald (1818), 1 Barn. & Ald. 727 (E. C. L. R.), 19 R. R. 442, 17 Rul. Cas. 177-186, n., 1 Gr. Ev. 268, Pars., Add., Chit., Ans., Beach, Conts., Bro. Max. 673, 2 Whart. Ev. 901, 2 Kent 510.

Statute of frauds; contracts. A contract may be gathered from several documents. B. v. D.; Dunlap's Arm'r v. Wright (1854), 11 Tex. 597, 62 Am. Dec. 506, n. But these cannot be connected by oral evidence. B. v. D.; Goss, Bibb v. Allen (1893), 149 U. S. 481, 37 L. ed. 819, Bish. Conts. 1249; Newbold v. Peabody Heights Co. (1889), 70 Md. 493, 3 L. R. A. 579,

Boydell.—
n.; Hickey v. Dole (1890), 66 N. H. 336, 49 Am. St. 614, n.; Ryan v. U. S., 136 U. S. 68; White v. Breen (1894), 106 Ala. 154, 32 L. R. A. 127: cases; Peay v. Seigler (1896), 48 S. C. 497, 59 Am. St. 731, n.

The whole of an agreement will be inspected and the true meaning within the four corners given. Palmer v. Palmer (1896), 150 N. Y. 139, 55 Am. St. 653, Ans. Conts. 252; Barnard: 108; *Ut res magis valeat quam pereat.*

All expressions relating to a subject will be sought, considered and given effect. Bro. Max. 541, 545, 546, 577-587; Gates v. Solomon (1868), 35 Cal. 576, 95 Am. Dec. 139, Black, Tax Titles, 700, 701, 707; Cool. Const. Lim. 71; L.C. 108, 371. *See Verba generalia,* etc.; *Verba relata,* etc.

Admissions; all must be taken together. 1 Gr. Ev. 200; Dickson: 34.

BRADBURY v. CRONISE: L.C. 35.

BRADLEY v. FISHER (1871), 13 Wall. (U. S.) 351; Chase, Torts, 206; Mech. Ag., Cool. Torts, 1 Kinkead, q. v.; Van Fleet, Coll. Att., Bailey, Brown, Jurisdic.

Excess of jurisdiction; effect of. Bradley; Crepps; Windsor; Piper: 114.

Corrupt motive of judge will not make him liable. Bradley. *See* Stewart v. Cooley (1877), 23 Minn. 347, 23 Am. Rep. 690, Cool. Torts 412, 482.

BRAY v. ADAMS (1892), 114 Mo. 486-493.

Administrator's deed is supported by presumptions of regularity. From it the order of sale, the appraisement of the premises, sale made in pursuance of the order, report of sale to the probate court and approval thereof by the court and the payment of the purchase money are evidence of the facts therein recited. The petition for the order of sale is liberally construed. It is presumed regular. *See* CONVENIENCE, § 53, Gr. & Rud.

Lost file papers are presumed to have been regular and sufficient. *See* Campbell v. Greer: 2*a*.

Utile per inutile non vitiatur applies to false description of land.

Essentials to support an administrator's deed enumerated. *See* Mohr; *Omnia præsumuntur rite,* etc.; *Probatis extremis præsumuntur media;* Bray.

Assignments of error depend upon objections and exceptions; without these the statutory record is useless; it is surplusage. It will not be opened or considered. § 53, Gr. & Rud. However, in *Bray* those requirements were overlooked, for without them the court considered and discussed matter in the statutory record, but only to disregard it. *See* Roden: 12*b* (Mo.). L.C. 296: cases; Kraner: 299.

BREACH OF CONTRACT: Frost v. Knight; Hochster: 308*a*, 308*b*; Anderson, 125 Ga. 62, 114 Am. St. 185, citing Frost, Hochster and Roehm; Beach, Conts. 403-421.

Remote and proximate damages. Hadley. Liquidated damages. Kemble: 391.

Breach of performance. 2 Langdell, Conts. 1080-1085. *Nullus commodum,* etc. St. Louis Beef Co. v. Ins. Co. (1906), 201 U. S. 173; Ans. Conts. 281-282.

Refusal to perform gives immediate right to sue. 2 Langdell, Conts. 1083. L.C. 308*a*.

Enforcement of contracts by courts of equity. Gossard, — Ia. —, 6 L. R. A. (N. S.) 1115-1146, ext. n.; Lumley.

BREACH OF PROMISE: 3 Suth. Dam. 983-990; 5 Cyc. 998-1021; Atchinson v. Baker (1829), Peake, Add. Cas. 103, 2 Chit. Conts. 794, 15 L. R. A. 531. *See* Van Houten v. Morse, *post;* Burnham v. Cornwell (1855), 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529-548, ext. n.; Smith v. Smith (1846), 1 Tex. 621, 46 Am. Dec. 121-134 (contract during continuance of prior valid marriage).

Woman concealing her affliction from an abscess, or her unchastity, is a ground for rescission. *See* Pasley: 375: cases; Grover, — Wash. —, 7 L. R. A. (N. S.) 582-592, n. (*locus pœnitentiæ*).

Breach of contract; anticipatory gives immediate right to sue. L.C. 308*a*, 178 U. S. 1-22; Anderson, 125 Ga. 62, 114 Am. St. 185, citing Frost, Hochster, Roehm.

Seduction as an element must be specially pleaded. Wrynn v. Downey (1906), 27 R. I. 454, 4 L. R. A. (N. S.) 615, 114 Am. St. 63 (as an actionable element).

Executors cannot sue for. Ans. Conts. 235; Chamberlain v. Williamson, 2 M. & Sel. 408.

BREACH OF THE PEACE: McClain, C. L. 1012-1021; 9 Am. C. R. 73; 5 Cyc. 1024-1036.

BREAKING AND ENTERING DOORS: to serve process, arrest, etc. Semayne's Case; *Domus,* etc. *See* DOOR; Bouv. Dic.

BREAKING AND ENTERING RAILroad cars. 7 Am. Crim. Rep. 106.

BREEZE v. HALEY (1887), 10 Colo. 5-13, 11 Colo. 351, *sub nom* Haley v. Elliott (1895), 20 Colo. 379; cited, §§ 151, 152, 199, 237, Gr. & Rud.; Rensberger v. Britton (1903), 31 Colo. 77-79, also 79-82; cited, §§ 13, 15, 45, 83, 122, Hughes' Proc.; §§ 115, 151, 158, 177, 199, 237, Gr. & Rud.; Russell v. Shurtleff, 28 Colo. 414, 89 Am. St. 216, cited, §§ 21, 23, 28, 35, 51, 65, 268, 321, Hughes' Proc.; §§ 158, 199, 237, Gr. & Rud.; also Hume v. Robinson: cases, and Moynahan v. P. are cases which are incompatible with fundamental law and a defensible and a protecting judicial establishment. That they may be understood more space is given them in the author's work on Procedure than can be afforded herein.

The *Breeze* and *Rensberger* cases will disclose a disregard of necessary and well settled law, also of many previous decisions of the court.

In the *Russell Case* conceived defects of a prayer to a statement for judgment overwhelmed the latter; in effect it was held that a judgment not strictly in accord with the prayer was *coram non judice.* This view is untenable anywhere, and especially in a state where pleadings are waived and where judgments are upheld if only one is served with process, and upon that a judgment is entered which the court could or might have entered had all further and usual ceremonies been respected. Hume v. Robinson: cases.

Where fundamentals are not understood contrary cases are decided by the same judge on succeeding pages. *See* 8 Colo. App. 40; *Id.* 285-286.

The requirements for the conserving principles of procedure (§§ 83-123, Gr. & Rud.) are not respected in all courts. *See* Preface, DATUM POSTS.

BREWER CO. v. BODDIE (motion for a new trial essential to present waivable error to an appellate court. General assignments of error insufficient. Miller v.

Brewer.—
Dill. The philosophy of preserving and presenting exception matter should be perceived from this and cognate cases. L.C. 290-399): L.C. 296.

BRIBERY: 2 Bish. Cr. Proc. 126, 127; 3 Gr. Ev. 71, McClain, C. L. 896-903, 10 Am. Crim. Rep. 135 (voters and jurors); 5 Cyc. 1039-1048.

BRICE v. BANNISTER: L.C. 398.

BRIDGES: 5 Cyc. 1052-1117.

BRIEFS: *See* APPELLATE PROCEDURE; 2 Cyc. 1013-1024.

BRIGHT v. BOYD (1841), 1 Story, (U. S.) 478, 2 Sto. 605, Fed. Cases 1875, 1876; 81 Am. St. 169; Keener, Quasi Conts., 2 Gr. Ev. 449, 2 Sto. Eq. 1237; *Valle's Heirs v. Fleming's Heirs* (1859), 29 Mo. 152, 77 Am. Dec. 557-565, ext. n., Sedgk. Trial of Title, Dev. Deeds, Wash. R. P., 2 Kent 335, 4 *id.* 344, Kinkead, Torts. *Jure naturæ*, etc.

Trespasser building on lands of another without his consent loses the improvements. Madigan v. McCarthy (1871), 108 Mass. 376, 11 Am. Rep. 371, 1 Wash. R. P. 1, 6, 7, 148, Tay. Land. & Ten. 544, 2 Wat. Tres. 1166, Cool. Torts, 501, 502, Sedgk. & Wait's Trial of Tit. 690-716; Jackson v. Loomis (1825), 4 Cow. 168, 36 Am. Dec. 347-354, ext. n.; Dutton, 21 Ind. App. 46, 69 Am. St. 340; Read v. Church, etc. (1891), 187 Pa. 320, 11 L. R. A. 727, n.; Kinkead v. U. S. (1893), 150 U. S. 483, 37 L. ed. 1152 (citing *Quicquid plantatur solo, solo cedit*); Defeback v. Hawke (1885), 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408; Howe's Civil Law 286.

Betterments; improvements on lands; right to recover for, in case of dispossession. 2 Kent 334-338; Green, 8 Wheat. (U. S.) 1, 5 L. ed. 547, n., 2 Kent 334; Pitt v. Moore (1888), 99 N. C. 85, 6 Am. St. 489-497, ext. n. (one inviting must pay for); Ramsden v. Dyson (1866), L. R. 1 H. L. Cas. 169-174; 15 Rul. Cas. 374, n. (equitable estoppel applies); Cleland v. Clark (1900), 123 Mich. 179, 81 Am. St. 161-193, ext. n.

Void judicial sale; purchaser entitled to compensation for betterments. Bright; Dering.

Equitable estoppel is a ground for compensation. Bro. Max. 402. *Purchaser at judicial and execution sale; rights to.* 21 L. R. A. 48.
Recovery for improvements made under mistake as to the ownership of lands. Keener, Quasi Conts. 377-387; *Nullus commodum*, etc.
Conversion of standing lumber; measure of damages. Chappel v. Puget Co. (1901), 27 Wash. 63, 91 Am. St. 820, n.
Rights in respect to compensation for improvements on land made in good faith under an oral contract or gift. Luton v. Badham (1900), 127 N. C. 96, 53 L. R. A. 337-349, ext. n.
The principle in Bright should be considered with that in Bull, *post.*

BRISTOW v. WRIGHT (*Allegata et probata* must correspond). L.C. 135.

BRITTAIN v. KINNAIRD (records are conclusive evidence. Mondel: 77): L.C. 50.

BRITTON v. TURNER: See *Cutter:* L.C. 308; Dame v. Wood.

BROKER: *See* George v. Claggett; AGENTS. Rights and remedies of brokers and their clients when purchases are on margins. Van Dusen, 75 Minn. 98, 74 Am. St. 463-483.

BROMAGE v. PROSSER (1825), 4 Barn. & Cress. 247 (10 E. C. L. R.), 6 D. & R. 296, 1 C. & P. 475 (12 E. C. L. R.), 28

Bromage.—
R. R. 251, Bigl. Lead. Cas. Torts, 131, Ames, Torts, 522, 2 Add. 1090 (New Def.), Cool., Chase, 128, 1 Gr. Ev. 34, Whart. Ev. 1262, 3 Gr. Ev. 168, 1 Bish. C. L. 429, Allen v. Flood. *Cited,* § 103, Hughes' Proc.

Malice is not implied where it is inferred that the communication is privileged, as in Harrison v. Bush. Byam v. Collins (1888), 111 N. Y. 143, 7 Am. St. 726; Childers v. San Jose, etc. Co. (1894), 105 Cal. 284, 45 Am. St. 40. *Malice; how proved.* Moak, Underh. Torts, 129, 3 Gr. Ev. 168.

BRONSON v. KINZIE: L.C. 238.

BROOKS v. MARTIN: L.C. 370.

BROOKSHIRE: *Sub* Hibblewhite.

BROWN, EX PARTE: L.C. 105.

BROWN v. BUTCHERS' AND DROVERS' Bk. (signature—what is a sufficient). L.C. 346.

BROWN v. CHAPMAN: *See* West v. Smallwood; FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

BROWN v. CHICAGO R. R. (1882), 54 Wis. 342, 41 Am. Rep. 41, 16 Am. St. 820. 829, 851, 11 N. W. 356, 911, 3 Am. R. R. & Corp. Rep. 443; 3 Suth. Dam. 940; Mech. Dam. 499. Beale, 134, cites and approves Squib Case, also *In jure*, etc.

Common carrier liable for the "natural, direct and probable consequences of his negligence." Contra: Pullman Co. v. Barker (1878), 4 Colo. 344, 34 Am. Rep. 89; 9 Am. Cas. Neg. 131, 16 Am. St. 829. See 1 Suth. Dam. 36; 2 Sedgk. Dam. 869 (where latter case is denounced). L. & N. R. R. v. Falney (1885), 104 Ind. 409, 3 N. E. 309, 400.

BROWN v. CITY (1886), 90 Mo. 377, 383.
Ordinances of town council invulnerable to investigation for fraud. Fletcher v. Peck; Cool. Const. Lim. 258.
General denial does not aid absence of allegations; evidence is not admissible upon denials alone. There must be allegations; Fish: 12*c*. Without them court can not receive evidence. Campbell v. Greer. *See* BOWMAN.

Facts not conclusions must be alleged.

BROWN v. COLLINS (1873), 53 N. H. 442, 16 Am. Rep. 372, 1 Thomp. Neg. 61, Smith, Torts, 357, Burdick, Torts, 103, 13 Am. Law Reg. 364, 1 Sedgk. Dam. 33, 36 Am. St. 847, Cool., Bish., Kinkead, Torts. *Cited,* 94 Tex. 159. *Cited,* § 348, Hughes' Proc.

Liability for allowing a horse to get beyond control on the highway. "Squib Case"; L.C. 208; Quarman. *Trying a horse in a public place is not negligence per se.* Proof of some negligence essential. L.C. 208.

BROWN v. KENDALL (1850), 6 Cush. 293, 15 Wall. 538, Chase, Torts, 51, Ames, Torts, 67, Whart. Neg., Shear. & Redf. Neg., Cool., Bish., Moak, Underh. Torts. *Cited,* § 348, Hughes' Proc.

Accidents excuse. K., while trying to separate his and B.'s dogs, which were fighting, knocked out B.'s eye with a pole, unintentionally. *Held,* an accident. *See* Guille; Vanderburgh. This injury belongs to that class where one is trying to save life or property. "Squib Case."
Cox, an infant, was out hunting, and M. and his slave were driving an unruly cow, and asked C. to aid them, which he did by punching the cow with his gun, but in replacing it in his saddle it was accidentally fired and thus killed

Brown.—
the slave. C. was liable in damages. *Morgan v. Cox,* 22 Mo. 375, 66 Am. Dec. 623; Austin v. S. (1900), 110 Ga. 748, 78 Am. St. 134, n.; 1 Thomp. Neg. 239-248; Cool. Torts, 797; Coggs: 350.

One accidentally shooting a bystander who is looking at him while cocking his gun, is liable. Underwood v. Hewson, 1 Strange, 596; 1 Thomp. Neg. 241. A soldier is liable for accidentally shooting his comrade while exercising. Weaver v. Ward (1625), Hobart, 134, 1 Thomp. Neg. 241. Firearms; negligent use of. 1 Thomp. Neg. 242-248; Dixon v. Bell.

BROWN v. LAMPHEAR: L.C. 347.

BROWN v. MARYLAND (1827), 12 Wheat. 419 (6 L. ed. 678, n.), 2 Thayer, Const. Cas. 1826, Marshall Const. Dec. 520-548; Woodruff; State v. Board of Assessors (1894), 46 La. 145, 49 Am. St. 318; American Co. v. Speed (1904), 192 U. S. 500. *Cited:* Ror. Interstate Law, 406, 409, 425, 1 Kent, 439, Tucker, Const.

Brown stated: A statute of Maryland required importers of foreign goods, and wholesale dealers in such, to pay a license of $50, under a penalty. B., an importer, refused to pay the license. *Held,* the act was unconstitutional. In Woodruff v. Parham, an auctioneer dealing in interstate goods in the original packages, under other but similar circumstances, was held liable to pay such a license. South Bend v. Martin (1895), 142 Ind. 31, 29 L. R. A. 531: cases (who is a peddler). In *Almy v. California,* a stamp was imposed upon bills of lading on gold shipped from San Francisco to New York City. A. violated this law and was fined $100. *Held,* this was a duty on exports and that the law was void. This case is stated and denied in Woodruff v. Parham. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it may be exercised at the will of those in whose hands it is placed. Brown, 141 Ala. 120, 109 Am. St. 26. See POLICE POWER.

Taxation; drummers selling interstate goods by sample cannot be taxed by states. Robbins v. Shelby County (1886), 120 U. S. 489; Norfolk *sub* Gibbons; Bartemeyer; Carrollton v. Bazzette (1896), 159 Ill. 284, 31 L. R. A. 522 (citing Brown and Woodruff).

Constitutional law; taxation; state duties on imports; original packages not within state protection. Brown; Bartemeyer; License Cases; *Almy* (1861), 24 How. (U. S.) 169; Ror. Interstate Law, 406, 413; 1 Kent, 39, 42.

State duty on exports upheld. Woodruff.

Power of Congress to regulate commerce. Gibbons; U. P. R. R., 156 U. S. 1 (when a manufactured article becomes within).

Criminal liability of interstate agents for the violation of state license. 13 Crim. Law Mag. 1-27.

BROWN v. P. (1874), 29 Mich. 232. S. P., Moore v. C., L.C. 21 (indictments must aver a crime); 1 Bish. Cr. Pr. 505-544; 6 Encyc. Pl. & Pr. 246-291.

Assignment of error essential. Brown; Ell. App. Proc. 300, 322, 401; Pow. App. Proc. 277; 2 Encyc. Pl. & Pr. 921. All is waived which is not assigned, if waivable matter. Brewer: 296. *See* ASSIGNMENT OF ERROR. § 53, Gr. & Rud. (convenience).

BROWN v. SPOFFORD: L.C. 54.

BROWN v. SULLIVAN (1864), 22 Ind. 359, 85 Am. Dec. 421-427. Meddling with a decedent's property constitutes a trespasser *ab initio.*

BROWN v. SWINEFORD: L.C. 161.

BROWN v. THARPE (1906), — S. C. —, 63 Cent. Law Jour. 403, n.

Local legislation is valid. A statute may make a stock law operative to part of a county only. P. *ex rel.* Armstrong v. Warden.

A statute is constitutional unless it manifestly violates some constitutional principle. A court cannot declare a statute void because of its opinion as to the policy, wisdom, expediency and adequacy of the law. Rison: 253; *see* Church v. U. S.; Trist: 214; Indianapolis R. R.: 223; Day v. Savage, Hobart, 87; *Lex non excete definit,* etc.

The principal case is inconsistent with the view that there is an unwritten constitution. It accords with Rison: 253, Blair: 254.

BROWN v. WALKER (1895), 161 U. S. 591-638, 40 L. ed. 819, 75 Am. St. 325, 346-347.

Nemo tenetur seipsum accusare. One having complete immunity can not invoke protection of this maxim, otherwise he might. Counselman v. Hitchcock.

Exposure to disgrace or penal or civil liability is no ground for protection from self crimination. Brown v. Walker; 1 Gr. Ev. *Cessante ratione legis,* etc.

A statute of another state re-enacted is given its construction of the home of its origin. Brown v. Walker; James v. Appel (1904), 192 U. S. 129, 135: cases; S. v. Moore: Cases; C. v. Hess.

BRUGGER v. S. INVEST. CO.: L.C. 162.

BUCHANAN v. ROY'S LESSEE (1853), 2 Ohio, 251. *Idem sonans.* Sarah Ray is not Sarah Roy, but further words of description may make the name certain. *Verba generalia,* etc. *Ut res magis valeat,* etc. Sarah Ray is not Sarah Roy, but taking all together it is.

Jurisdiction of both person and subject-matter essential. See *Audi,* etc.

A pleading bad on general demurrer may be good on collateral attack. See, *contra,* McAllister: L.C. 3; Bro. Max. 602; Slacum; §§ 10-12. Hughes' Proc.

BUCK v. COLBATH (1862), 7 Minn. 310, 82 Am. Dec. 91, 3 Wall. (U. S.) 341, stated, 132 U. S. 482.

Buck stated: B., a U. S. marshal, under a writ of attachment, seized property claimed by Colbath, a stranger to the proceedings and not named therein. C. did not intervene and claim the property as he could have done but he afterward sued B. in trespass in a state court and recovered. B. pleaded exactly as did Freeman in *Freeman v. Howe:* 287, and namely, that he was a U. S. marshal and that he did it *as* marshal *(Tarble's Case:* 247). That was a replevin suit and involved the comity of courts *(Taylor v. Carryl,* 20 How. 497).

B. did not aver the property was the de-

Buck.—

fendant's named in the writ or that he was commanded to seize it. For omitting this he failed to show that a federal question was involved. He lost in the state courts, and like Freeman he applied for a writ of error to the supreme court of the U. S, which was refused. The writ was allowed Freeman because the comity of courts was involved. But in *Buck's Case* it was not, for the litigation was over; here was a material difference.

Every presumption is against a pleader: Verba fortius, etc. Dovaston: 217. To this the presumption of regularity yields. *Omnia præsumuntur,* etc. A fact not juridically presented cannot be judicially considered. *De non apparentibus,* etc.

An authority must be pleaded. Hopper: 4; Tarble's Case: 247.

Jurisdiction depends on proper allegations. Campbell v. Greer: 2*a*. *See* ALLEGATIONS.

BUGGERY: *See* SODOMY (2 Bouv. Dic. 1010; And. Dic. 958).

BUILDER: 6 Cyc. 6-115.

BUILDING AND LOAN SOCIETIES: 6 Cyc. 120-165.

BUILDING REGULATIONS: Constitutionality of. Bostock v. Savus (1902), 95 Md. 400, 52 Atl. 665, 93 Am. St. 394-411, ext. n.

BULKLEY v. LANDON: L.C. 315.

BULL v. GRISWOLD (1858), 19 Ill. 631; Wat. Set-off, 550, 3 Suth. Dam. 1020, 1028, Dev. Deeds, 57, 62, 2 Wh. Ev. 866; Cobbey, Replevin, 932. *Cited,* §§ 71, 164, 281, 289, 296.

Bull Case stated: A trespasser can take nothing by his trespass. A farmer by trespass took possession of a field and upon it raised a crop of wheat, hauled it to market and stored it in an elevator, where the owner of the field replevied the wheat as owner. He recovered the wheat without any allowance whatever to the trespasser for his husbandry—his labor and expense for planting, harvesting, threshing and hauling to market. 3 Suth. Dam. 1127; Everson, 2 Wat. Tres. 1073, *citing* Ellis v. Wire.

Trespasser cannot plead the benefits of his trespass as a set-off or counterclaim. Otherwise, in effect, a contract could be enforced upon one against his consent—assent. This would be arbitrariness in its most hateful and tyrannical form. § 3, Hughes' Conts. Such a liability upon a party would lead to the destruction of a fundamental right, and indeed of liberty itself. One's own delict can be no initiation or element of a valid contract, under a system of laws founded upon morality and for protection. Courts are created to protect wronged parties, not wrongdoers—malefactors.

Phases of these subjects involve *Salus populi suprema lex,* and the principle in *Ashby. See* Martin v. Porter; Forsyth; Merryweather (no contribution among wrongdoers). One who offends the law cannot be protected by the law. Armory. *Non hæc in fœdera veni.*

Nullus commodum capere potest de injuria sua propria. Parker, 12 Met. 415, 1 Thomp. Neg. 37-391, ext. n., 46 Am. Dec. 694, *cited* 2 Pars. Conts. 243; *Qui*

Bull.—

primum peccat ille facit rixam; Squib Case.

No man can invest himself with title to property, or to a defense, or to any right, by his own wrongful act. This is a fundamental underlying principle, equally applicable to all branches of law, and of course to contracts. Merryweather; Bright v. Boyd.

A trespasser has every presumption made against him. Armory. If he builds on the lands of another or makes other improvements, he loses his betterments. If he sets a dangerous thing in motion, he is liable for the consequences. Squib Case; Stetson (illegal assessment for taxation).

A trespasser can take nothing by his trespass. Bright: cases; Foote v. Merrill (1874), 54 N. H. 490: cases, 20 Am. Rep. 151, 3 Suth. Dam. 1020, 1110, 1127; Jewett v. Dringer, *post:* cases.

Volenti non fit injuria. Bright; Jewett; Bull. *Qui primum.* An officer failing to return his process is liable as a trespasser *ab initio.* Notes to Six Carpenters' Case, Smith, Lead. Cas. (9th ed.). A wrongdoer cannot be allowed to make a profit out of his wrongful act. Cobbey, Replev. 932.

BUNN v. RIKER: L.C. 362.

BURDEN OF PROOF: 1 Gr. Ev. 74-81; 1 Wh. Ev. 621; Bouv. Dic. (ONUS); 4 Wigm. Ev. 2483-2498; 1 Ell. Ev. 128-142; 16 Cyc. 926-938. *See* EVIDENCE.

Cited, Leading cases: Bonnell v. Wilder; C. v. McKie, L.C. 185-188; Bristow v. Wright; Nepean v. Doe: Smith, L. C.

Maxims: Actore non probante reus absolvitur and cognates; *Semper præsumitur,* etc.; *Ei incumbit,* etc.; *In æquali melior,* etc.

Whoever must allege must likewise prove. What is not juridically presented cannot be judicially considered. *Dovaston v. Payne; U. S. v. Cruikshank; Frustra probatur,* etc.; 1 Gr. Ev. 63; *Fish v. Cleland* (Ill.); *Borkenhagen v. Paschen* (Wis.); *McKyring v. Bull; Deputron v. Young; see* NEGATIVE ALLEGATIONS.

Defendants are favored both as to allegations (Dovaston v. Payne, L.C. 217; *Verba fortius,* etc., 64 Cent. L. J. 128-134, 169-174), *and as to proofs.* L.C. 185; *Coffin v. U. S.* (innocence presumed). Evil, wrong and deliction are presumed against. *Favorabiliores,* etc. A constitutionalism depends on this rule. Were it not so accusation would be condemnation. Under such a rule courts would have despotic powers. Then who could defend himself? Who would be safe? The rule is an interaction of the profoundest principles of government. It involves the grounds and rudiments of law, also the conserving principles of procedure. 64 Cent. L. J. 128-134; 169-174.

He who holds the affirmative must allege and prove, is a rule of logic.

Prima facie evidence; what is. See NEGLIGENCE; *Res ipsa loquitur;* POSSESSION; PREPONDERANCE OF EVIDENCE; Kearney: 211: Cases.

The theory of American governments, like that of Rome and Great Britain, is accusatory, not inquisitorial. Hale v. Henkel. One must first allege (*see* ALLEGATIONS) and next he must prove; the averments are a limitation of authority. This is a primary safeguard; and next are the proofs.

Burden.—

One who assumes or alleges a law must show it. C. v. Bank.

There must be in view the cause of action, its material allegations (*see* SURPLUSAGE), the admission and denial (*Dickson v. Cole:* 34; DENIALS; ADMISSIONS) and the issue (*Munday v. Vail* (N. J.): 79; *Israel v. Reynolds:* 83; *Fish v. Cleland* (Ill.): 12c; *Borkenhagen v. Paschen* (Wis.): 81.

Allegata et probata must correspond. *Frustra probatur,* etc.; Crain v. U. S. (issue must appear from right record). Aylesworth.

Mandatory record is the right one: to determine who has the burden and what he must prove, also the allegation, the admission and the issue. It alone is the authority upon which the court proceeds. It binds the court; it is the chart and compass to guide; it is the anchor of safety. It is an implication in constitutional law. For its limited purposes it is the only record. *Clem v. Meserole.* Right views from it are the best guides through the "futile grist of profuse jargon" from many courts who have stores of precedents that may be cited either for or against that record upon which the rule in question depends.

Courts may call for proof of a sufficient case, also for the *bona fides* of the allegations or denials. The conserving principles of procedure often influence the rule; likewise the grounds and rudiments of law influence it.

Order of proof; Right to begin; L.C. 185: cases.

BURGLARY: 6 Cyc. 172-256; 10 Am. Crim. Rep. 149 (breaking and entering to get one's own property); 2 Bish. Cr. Proc. 128-153; B. & Hd. L. Cr. Cas., 3 Gr. Ev. 74-83. Bouv. Dic. McClain, C. L. 495-516.

Breaking. Bouv. Dic.; 5 Am. Crim. Rep. 103 (curtilage); 6 *id.* 82-84 (possession of stolen goods); 9 *id.* 147 (ownership of property).

BURKS v. BOSSO: L.C. 217a.

BURLEY v. GERMAN AM. BANK (1883), 111 U. S. 216 (28 L. ed. 406).

General denial under codes; sufficiency of. Objections should be made before trial.

BURNLEY v. COOK (1855), 13 Tex. 586, 65 Am. Dec. 79, stating Poor, L.C. 37.

Denials must be exact in an answer to dissolve an injunction. Dinehart: L.C. 279.

BURROWS v. MARCH GAS CO. (1872), L. R., 5 Exch. 67, 7 Exch. 96, 2 Thomp. Neg. 1070, 36 Am. St. Rep. 822, 18 Rul. Cas. 757, Mews' E. C. L. 369, E. C. L.; 1 Suth. Dam. 18, 40, Wh. Ag.; Bro. Max.; Bish. Torts; Whart. Neg.; Busw. Pers. Inj. 103; note, Ashby v. White; 1 Sm. Lead. Cas. 506; 68 R. R. 769. *Cited,* § 347, Hughes' Proc.

Concurrent negligence of both parties. Davies. It is actionable to repair and assure an owner that a gas pipe is safe when it is not. Gas Co. v. Baker (1897), 146 Ind. 600, 36 L. R. A. 683, n. Here a duty is due, and this is an element. 36 Am. St. 683, n.; Missouri, K. & T. R. R. v. Wood; Burrows.

BURTON v. U. S. (1906), 202 U. S. 344-400.

Statement of Burton: A statute forbade officials from acting where the government was a party. B. was a U. S. senator and violated this statute by a contract made by letter sent him from St. Louis to Washington, from whence he accepted the offer by letter. He acted under the contract at Washington. For this he was indicted at St. Louis. He made several defences and one of former jeopardy, wherein the court *compared the former indictment, judgment and record;* also that it was not a St. Louis contract, also that the U. S. had no interest in the matter. However, he was convicted.

Division of state power; rule stated; purposes of.

Limitations of the power of the U. S. to define and punish crimes. Citing Martin v. Hunter: cases.

Former jeopardy; how pleaded; judgment and copy of indictment; the latter is compared. C. v. Roby cited.

Contracts by letter when complete. Tayloe; Patrick cases cited and approved: cases.

Morality is a ground and rudiment of law. Church v. U. S.

BUSTEED v. PARSONS (1875), 54 Ala. 303, 25 Am. Rep. 688, n., Kinkead, Torts.

Immunity of judicial officers from trespasses and other wrongs. Lange; Piper: L.C. 159, 114. *Cited,* § 28, Hughes' Proc.

BUTLER v. BARNES (1891), 60 Conn. 170, 12 L. R. A. 273-279.

Mutual mistake in deed; equity will correct. Wheadon v. Olds.

Joinder of actions of deed may be reformed and enforced in the same action. Pom. Rem. 78; Brugger.

BUTLER v. P. (ordering a witness attached without first subpœnaing him is a contempt), L.C. 106.

BUTTERFIELD v. FORRESTER (1809), 11 East, 60, Sm. Cas. Torts, 150, Mews' E. C. L.; 13 Fed. 161, 69 L. R. A. 293, Cool. Torts, Add., Bish., Suth., Dam., Gould, Watr., 2 Gr. Ev. 232*a*, 267, 473, 3 Kent, 230, Busw. Pers. Inj., Pars. Conts., Whart. Neg., Shear. & Redf., Wood, Nuis., note, Ashby v. White; 1 Smith, Lead. Cas.

Butterfield stated: Forrester, without right, put poles across a highway which B. was traveling at dusk at reckless speed. He collided with the poles and was injured. *Held,* he was guilty of contributory negligence and that he could not recover. *See* Davies v. Mann; R. v. Longbottom; Burrows; *Volenti non fit injuria.*

Crossing a railroad track without looking is contributory negligence. "One must stop, look and listen." Sweeney; Elliott v. Chicago, etc. R. R. (1893), 150 U. S. 245: cases; Davies.

Child; when guilty of contributory negligence. Lynch, *sub* Squib Case.

Traveling on highway known to be out of repair is not. Fort Wayne v. Breese (1889), 123 Ind. 581, 2 R. R. & Corp. Rep. 237.

BYRKMIR v. DARNELL: L.C. 339.

BYRNE v. BOADLE (*Res ipsa*): L.C. 209.

BYRNE v. VAN TIEN HOVEN. *See* Adams: 326. *Cited,* § 50, Hughes' Conts.

CADAVAL v. COLLINS (1836), 4 Adol. & El. 856, 858 (31 E. C. L. R.); 2 Chit. Conts. 933, 936, 947, Smith 236. *See* DURESS; § 65, Hughes' Conts.

CAHILL v. EASTMAN (1871), 18 Minn. 324, 10 Am. Rep. 184-200, 36 Am. St. 840, 1 Thomp. Neg. 163, 4 Kent 110, n.; Gilson; Bailey v. Mayor. *In jure non remota,* etc.; § 348, Hughes' Proc.

CALDER v. BULL: L.C. 237.

CALDER v. HALKET: See Piper: 114.

CALIFORNIA: Many cases of this state are very instructive. Among these is Green v. Palmer: 90. At times decisions have appeared that greatly disturbed well settled principles. *See* Bell v. Brown. In *Galpin*: 63 one of these, namely, *Hahn v. Kelly*, is quoted and discussed, wherein the guaranty of due process of law was thought by the court to be a meaningless phrase, inserted in constitutions to fill up—for euphony—for rotundity of sound. But Justice Field thought otherwise. His views in that case are truly instructive.

CALIFORNIA v. SAN PABLO R. R.: L. C. 270.

CALLISHER v. BISCHOFFSHEIM (1870), L. R. 5, Q. B. 449, 452, 1 Chit. Conts. 38; 1 Pars. 480; Langd., 54-56, 84; Bish.

Forbearance as a consideration. § 122, Hughes' Conts.

Conclusiveness of a judgment or compromise upheld. But *see* Banner, *in re* Blythe (1881), 17 L. R. Ch. Div. 480 (a judgment or compromise may be inquired into for fraud). 1 Pars. Conts. 480 (9th ed.); Longridge; Edwards v. Baugh; Llewellyn; Crowther; Cook v. Wright; Callisher and Lansdown are old and valuable allies in presenting the law of compromise. They are usually closely associated in citation by all authors. Lansdown.

CALYE'S CASE (Innkeepers): L.C. 356.

CAMPBELL v. GREER: L.C. 2*a*.

CAMPBELL v. P. (1854), 18 Ill. 171, 1 Crim. Def. 282, 61 Am. Dec. 49-58. *Cited*, § 313, Gr. & Rud.

CAMPBELL v. PORTER: L.C. 2.

CAMPBELL v. RACE (1851), 7 Cush. (Mass), 408, 54 Am. Dec. 728-734, n.; Ames, Torts, 196, Chase 166, Burdick 136, Moak, Underh. 500, Cool. 368, Kinkead 546, Webb, Pollock, 476 (trespasses justified by necessity), Bish. Torts, 162, 822, 2 Wat. Tres. 703, 704; Bro. Max. 2; 2 Dill. Munic. Corp. 1008; Beach 1518; 2 Gr. Ev. 627; Ell. Roads. *Cited*, § 46, Gr. & Rud.

Necessity justifies a trespass. R. was unable to drive over a highway, it being obstructed with snow drifts; to avoid these he turned from the way and drove over lands of C., who sued R. in trespass, but who was defeated in the action. It is a rule that a traveler may enter on and pass over adjoining lands if the highway is impassable. This right arises from necessity. *Necessitas. Salus populi.* Taylor v. Whitehead, 2 Doug. (Eng.), 745, 749, 2 Kent, 328; American Print Works (property may be destroyed to arrest a conflagration).

CANALS: 6 Cyc. 268-281.

CANCELLATION OF INSTRUMENTS: *See* REFORMATION; RESCISSION; 1 Beach, Conts. 789-849; Bouv. Dic.; And. Dic.; works on Equity Jurisprudence; 6 Cyc. 285-345.

For mistake. Steinmeyer, 226 Ill. 9, 117 Am. St. 224-246, n.

Cancellation of forged instruments upon principles of *quia timet*. Vanatta v. Lindley (1902), 198 Ill. 40, 92 Am. St. 270: cases.

CANNON v. JENKINS (1830), Dev. Eq. 429. Denials must be perfect, certain and precise. Dickson: 34.

CAPITAL TRACTION CO. v. HOF (1899), 174 U. S. 1-46. *Ad quæstionem*, etc. Hodges v. Kimball, 104 Fed. 745.

CAPTIONS: Title of court. Bouv. Dic.; Bliss, Code Pl. 144; Maxw. Code Pl.; Phillip, Code Pl.

Assignment of errors must contain names of parties. Ell. App. Proc. 322; Loucheim v. Seeley (1898), 151 Ind. 665-667.

Caption of complaint must correctly entitle court. Jordan v. Brown. Description of court essential. Jordan. Of plaintiff and defendant. *See* TITLE OF COURT; Bouv. Dic.

All pleadings must be properly entitled of the court and term. And. Steph. Pl., § 227. Not a fatal defect. Van Fleet, Coll. Att. 243. If variant from statement, the latter controls. Mississinewa. Partnership and corporate existence sufficient, if in caption. Adams Express Co. v. Harris (1889), 120 Ind. 73, 16 Am. St. 315. Constructive notice is a high policy of the law, requiring precision and certainty. For these it influences procedure. Allegations in, improper. Jackson v. Ashton.

CAROTTI v. S.: L.C. 179.

CARPENTER v. SHERFEY (1874), 71 Ill. 427, 2 Suth. Dam. 467, 2 Best, Ev. 591, Freem. Judg. 48, Black, Judg. *Cited*, §§ 224, 323, Hughes' Proc.

Judgments must be certain; amount of judgment must be certain, and so must assessments. L.C. 132, 133.

CARRIERS; COMMON CARRIERS: Bouv. Dic., And. Dic., 2 Gr. Ev. 208-222*a*. *See* BAILMENTS; Coggs: 350; 3 Suth. Dam. 877-956, 6 Cyc. 364-678.

Liability of. 2 Gr. Ev. 268-322; 2 Sedgk. Dam. 840-873; 3 Suth. Dam. 877-956. Passenger's rights. 1 Bouv. Dic. 367; L.C. 350-355: cases. Ticket. Bouv. Dic.; L.C. 357; Cherry.

Not liable for inherent defects of goods. Bro. Max. 393; notes to Coggs: 350.

"Long and short haul" provisions; construction. L. & N. R. R. v. C. (1899), 106 Ky. 633, 90 Am. St. 236-263, ext. n.

Missile thrown at car; liability of carrier for. Woas, 198 Mo. 664, 7 L. R. A. (N. S.) 231, n.

CARTER v. BOEHM (1765), 1 Wm. Bl. 593, 3 Burr. 1905-1919, Sm. L. C., 13 Rul. Cas. 501-531; Finch, Cas. 486, Thayer, Cas. Ev. 669, Bro. Max. 792, 795, 2 Chit. Conts. 1026, 1046, 1 Gr. Ev. 440, 441, 1 Greenh. Pub. Pol. 156, 2 Pars. Conts. 470, 513, 586, 2 Pom. Eq. 907, Bisph. Eq. 213, 3 Add. Conts. 1157, 2 Kent 487.

Cited, § 281, Gr. & Rud.

Insurance; warranty—Concealment of material facts vitiates policy of insurance. Carter; Pasley; Jones, Construc. Conts. 233-246; Locke v. North Am. Ins. Co. (1816), 13 Mass. 61, 2 Am. Lead. Cas. 926-940, ext. n. (the law of insurable interest. Greenh. Pub. Pol. 238-291; Godsall); Behn.

Material facts; concealment of; marine and fire insurance. This will vitiate the contract; the assured has no contract whatever if he concedes any material fact; but a less strict rule is applied in life insurance. *Caveat emptor.* Wheelton v. Hardisty (1857), 8 El. & Bl. 232 (92 E. C. L. R.), Ans. Conts. 148-150, 3 Kent 254-376; Behn; Lang. Cas. Conts. 556, 5 Rul. Cas. 492-563, n., 3 Am. Law Reg. 492, Chit. Conts., Add. Conts., Kent; Carter ("now in port at Amsterdam" is a warranty); Ans. Conts. 140.

Descriptive words are material. Carter; Davison v. Von Lingen (1884), 113 U. S. 40, Huff. & Wood. Am. Cas. Conts. 265.

Carter.—

And this is the rule of pleading and proof. *See* Bristow: 135.

Incumbrances: concealment of, when vitiating. Continental, 126 Ind. 410, 10 L. R. A. 843, 4 Am. R. R. & Corp. Rep. 244, 266, ext. n.

Mortgage as affecting change of title or interest in insured property. Sun Fire Office of London v. Clark (1895), 53 Ohio St. 414, 38 L. R. A. 562-569, ext. n., 80 Am. St. 305-311.

Construction of warranties; representations; conditions. Additional insurance and care of property. Imperial Ins. Co. v. County of Coos (1894), 151 U. S. 452, 38 L. ed. 231, n.; 14 Rul. Cas. 1540.

Assured may sue wrongdoer for allowing fire to escape and also collect the insurance. He may recover twice. Anderson, 96 Tenn. 35, 54 Am. St. 812, n., 31 L. R. A. 604. *See* Fent.

Revival of forfeited insurance by discontinuance of cause of forfeiture before loss. Barn, 110 Ia. 379, 80 Am. St. 300-311, n.

CARTER v. TOWNE (1868), 98 Mass. 567, 96 Am. Dec. 682, Burdick, Torts, 354, Cool. 83, 705, 706, 1 Kinkead 266. *Sub* "Squib Case." *Cited*, § 347, Hughes' Proc., § 296, Gr. & Rud.

One is liable for selling a noxious agent, like gunpowder, to an infant, with which he injures himself. "Squib Case." *Sic utere*, etc.

A school teacher is liable in assumpsit for allowing one of his infant pupils to injure himself with fireworks. Cited, *sub* Missouri, K. & T. R. R. v. Wood. From a contract we often trace a tort.

CASE: 1 Chit. Pl. 148-164 (16th Am. ed.), 2 Gr. Ev. 223-232*a*; "Squib Case"; Bouv. Dic., And. Dic.

CASE STATED: Bouv. Dic. *See* AGREED CASE. 6 Cyc. 682-699.

CASE SYSTEM: In 1835 Mr. J. W. Smith published his "Leading Cases," now used in the eleventh edition, the latter fact bespeaking their appreciation. This work has always stood very high, along with Broom's Maxims, Story's Equity Pleadings, Greenleaf on Evidence and Bishop's works, notwithstanding the extraordinary liberties taken with the most important cases—namely, the cases on Procedure, such as *Rushton v. Aspinall*, *Bristow v. Wright* and *J'Anson v. Stuart*. The Supreme Court of the U. S. approvingly cited this work in four different cases in one volume (94 U. S.). These observations are inspired by the facts just named and by the matter found in the Reports of the American Bar Association, particularly the 25th volume (1902) thereof.

If it can be assumed that Smith correctly conceived the "Case System," then all students and lawyers of considerable research can readily perceive what it means, and generally they will admit the excellence

Case System.—

of the cases selected by him, and recognize the fundamental principles taught thereby. Broom taught "Let the purchaser beware" under *Caveat emptor*, while Smith taught that fundamental principle under the cases, *Chandelor v. Lopus* and *Pasley v. Freeman*—the notes thereto including *Laidlaw v. Organ* and numerous other American cases. In the criminal law the same principle is elucidated and applied in *R. v. Wheatley*, a case decided by Mansfield, the lawyer of the ages. The *Pasley* and *Laidlaw* cases are cited by Greenleaf and also by contract works generally. As it were, these cases are a part of the principle, *Caveat emptor*, parts of which are well introduced by those who cite them in relation to criminal cases (See *Bennett & Heard's Leading Crim. Cases*, 1-34). The maxim, *Caveat emptor*, like any other great principle or rule of law, is a part of many branches of the law. This thought leads up to the idea that is advanced in the preface of *Bishop's New Criminal Law*—namely, that the law is an entirety—in other words the same law, in reason, pervades our entire legal system. In view of the foregoing facts it may be asked, wherein does the modern "Case System" differ from the earlier one of Smith's? If the former differs from Smith's, wherein and how? Does it teach *Caveat emptor* better than it is explained in Broom, or in the *Chandelor*, *Pasley* and *Laidlaw* cases? Is not *Caveat emptor* the fountain, and are not these cases mere rivulets emanating from that source? But of all cases compiled which will lead through tables of cases cited better than those selected by Smith? What other cases will serve their purpose so well as Smith's? Now, why can not the American "Case System" advocates agree on those cases and the other very able selections of Smith, who chose cases because they were old, prominent, widely found and cited? Should not Smith's plan of selecting cases govern in America as well as in England? In effect, this plan was proposed by a member of the American Bar Association. There is some ground for the belief that the views of Broom, Smith and Bishop are denounced by the ex-

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treme "Case System" advocates in America, though it may be said that these advocates are not generally in accord among themselves and that they appear to claim something not well understood by the legal profession, certainly not by the disciples of Blackstone. Some of these advocates declare that lawyers are fools because they cannot anticipate astonishing decisions of uncertain and fluctuating courts, as will appear in the volume last above cited in relation to a discussion of *Hahl v. Sugo*, which involved a discussion of whether or not "adjective" and "substantive" laws are not interactions. How this question was presented and met is very instructive matter relative to what has become a leading question within the last few years.

It is not difficult to see that old and notable cases may be selected and so elucidated as to be complements of all the works above mentioned; but for this purpose must be selected such leading cases as the "*Squib Case*" and *Coggs v. Bernard;* In other words, to accomplish the desired object the selections must be nearest the fountain. Now, by fountain, is meant a basic principle, and *Caveat emptor* is one of them. It means that every man ought to know his own business, his wants and what will please himself. The cases that illustrate the application of the maxim are rivulets, and these are numberless. Would it evince wisdom to wander down the rivulets and select these at varying tides? If we do this, can we make such matter a complement to old and cosmopolitan works? It may be very complimentary to select the rivulets of each tribe or neighborhood, but can this be done with as good results as upon the plan adopted by Smith in his works, where the notes of his leading cases represent rivulets, as it were? In this connection should be considered the maxim *Melius petere fontes quam sectari rivulos* (it is better to seek the fountains than wander down the rivulets).

For each state there are most valuable works, such as Puterbaugh's, Bryant's, McDonald's, Kelley's, Sayles', etc., but with all their merits they are rivulets, and the student at least should avoid them until they

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are explained to him as a part of and in connection with the fountain. This is the idea: The student should be introduced to the grounds and rudiments of the law—the fountains of the legal system, after seeing and understanding these he may proceed therefrom and explore the branches of the law—the rivulets of the legal system. This was the plan of Smith, and it accords with Broom, Story, Greenleaf and Bishop. If the American "Case System" involves a plan that is opposed to the old and cosmopolitan one, the promoters of the former should state their positions and objects more clearly for the information and benefit of the profession. Upon the older or English plan, the facility in finding the law may be greatly advanced by directly leading to the maxim or case on the subject under consideration. When this step is accomplished the work is generally more than half done, especially with those who properly appreciate a table of cases cited, which may be made a table of great principles and indeed the most accurate index to well written text books and sets of reports. Whether or not the American "Case System" attains these results must be judged from the literature elaborated to advance it. A tree is known by its fruit. It is due to observe that the Smith plan permits the dropping of inferiors and duplicates and vast accretions of cognate cases, exactly as do general literature and history. Only cases that are notable and truly great for the ends and purposes in view should be selected and made leading and prominent content matter. The question as to whether or not the best results can be obtained by the use of that matter, which may be properly designated as remote, neighborhood, tribal and flood-time rivulets, is not debatable with those who appreciate the plans of Smith, nor those who know the use and importance of a table of cases cited. It is apparent that within the last generation many kinds of sects and isms have arisen and become prominent; one of these calls a table of cases cited a useless pad; and as an indication of a disposition to cater to this view many books omit tables of cases cited therein, and then the professional "book

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boosters" praise the more. In such books there may be very valuable discussions wherein the fountains—the maxims—or the cases reaffirming them, are cited, still all these gems are locked up for the want of completeness and a key such as the Smith, and the Bennett and Heard plans are designed to give. Surely familiarity with those notable cases nearest the fountains is not useless learning; effort in this direction is not making a garret of the mind. All who pretend to even slight learning must know the twenty-six characters of literature and the ten characters of numbers, and also the ten commandments. These are necessary elements of learning that endure throughout the entire world; they are not flood-tide, neighborhood rivulets. Learning them is not like filling the mind with ephemeral data and statistics, such as the population of cities or statutory regulations. The law has its grounds and rudiments, and these are as enduring as the elemental characters of numbers, and they should be familiar to every real lawyer. A system of legal literature that does not gather, express and well teach these fundamentals of the law must sooner or later meet a deserved condemnation; and a system that leads away from where these are widely found and reprinted and correctly taught cannot be conducive to greatest good. In this connection it appears proper to suggest to the student: That he who begins the study of the law would do well first to gain a fair knowledge of the plans of the works above mentioned, and learn what a table of cases cited is for; he can then judge for himself as to what his future course of reading and thought should be. In all ages there have been contentions as to teaching law and morals. Moses had some troubles in this field of endeavor, also Socrates, Saint Paul, Justinian, Bacon, Mansfield, and Bishop. The memorable debate between Bacon and Coke (the giver of the English lawyer's bible) before their king as to whether or not chancery jurisdiction should be extended over the judgments of common law is one of the great events of the onward march of jurisprudence among the English speaking race. The King's decision settled a furious dispute of four centuries

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(*Earl of Oxford's Case, A. D.* 1616.) History discloses that quackery has forever threatened jurisprudence quite as much as it has medicine. One of Justinian's edicts was promulgated to protect the law by compelling commentators to cite its fundamentals; like food, drink and medicine, the law is easily adulterated. Organized, blatant charlatans with theories however absurd often prevail where there is no organized opposition or resentment. Empiricism has impaled itself in every age for tampering with the laws. It advances its work of destruction under the banners of *stare decisis* and *Volumus legem mutare*, in alternation.

The fundamentals of the law are as immutable as the universe itself, and every influence designed to obscure them should be vigorously resisted. These fundamentals should be strictly adhered to and ever regarded as monuments of the law from which reckonings should be made in the consideration of individual causes. Yet, at the present time, there are indications of a lack of due appreciation of these principles, and as evidence of this fact one has only to look at the attacks that are being made upon the common law or mandatory record in a multitude of our states and the dismemberment of jurisprudence thereby. The causes that lead to such dreadful results must be set to quackism and superficial writing and teaching of the law.

Judging from the principles contended for by all the most illustrious legal lights above mentioned, they would have decided with the majority of the court in *Haddock v. Haddock*, "that the letter killeth the spirit." Those who have done most for jurisprudence teach that there is no royal highway to learning the law; it must be thought. These great minds have been friendly and solicitous for all plans that could reasonably lay claim to substantial merit. They believed that the grounds and rudiments of law could be concisely stated and learned in a few sections or chapters, and also that the cases applying the grounds and rudiments in particular cases in various countries are infinite.

A work constructed on leading cases that embody and illustrate the

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The grounds and rudiments of the law are thoroughly cosmopolitan, and may be learned alike around the Mediterranean, the Atlantic and the Pacific, and throughout the American states without regard to local and provincial views as to the text book, the old case or the new or late case. The fountains or fundamentals of jurisprudence are the same in all centuries and in all ages; and all who deny these facts and lead away from these views are the *ignes fatui*, leading over the sunken way into briary labyrinths hopelessly into the morass of bewilderment and disappointment. See PREFACE, Hughes' Conts.; Proc. pp. 1-43; also LITERATURE, *id.;* 64 Cent. L. J. 129-134, 169-174.

CASTIONI, IN RE (1891), 1 Q. B. 149, 17 Cox, C. C. 225, Snow's Int. Law, 163; cases; Warb. C. C. 209; Mews, E. C. L. (extradition).

Extradition of fugitives from justice. S. v. Hall (1894), 115 N. C. 811, 44 Am. St. 501, 28 L. R. A. 289, 10 Am. Crim. Rep. 297 (one must have been in requesting state); Hart, *ex parte* (1894), 63 Fed. 249, 28 L. R. A. 801, n. (necessary papers); Barranger v. Brown (1898), 103 Ga. 465, 68 Am. St. 113-134, ext. n. (*habeas corpus*, in cases of); Isagi v. Van de Carr (1897), 166 U. S. 391 (pleading, practice, evidence); 8 Encyc. Pl. & Pr. 800-826; Cool. Const. Lim. 25; Sedgk. Stat. 568-570; 1 Bish. Cr. Proc. 219-224*b*; P. v. Hyatt (1902), 172 N. Y. 176, 92 Am. St. 706: cases; Interstate Extradition (Hawley).

Between what countries. And. Dic., Bouv. Dic.; Ker v. Illinois (1886), 119 U. S. 436; Brown, Jurisdic.; Am. Crim. Rep.

Crime must be common to both countries. Wright v. Henkel (1903), 190 U. S. 40.

CASTLE: Protection it affords. *Domus*, etc.; Semayne's Case; Ald. Jud. Writs 175.

CASUS OMISSUS: Can never be supplied by a court. Jones v. Smart (1785), 1 T. R. (D. & E.) 44; Mews' E. C. L.; Suth. Stat., §§ 430-433; Smith. Const. Stats. 537, 720; Sedgk. Stats. 253, 328; Dewey v. U. S., 190 U. S. 248, 199 U. S. 443; 1 Sto. Const. 426: *In re* Walker (1895), 110 Cal. 387, 52 Am. St. 104 (statute must speak for itself); Hawaii; Spraigue; And. Dic.; *Ita lex scripta est.*

Casus omissus in construction can never be supplied, nor the omitted allegation. L.C. 5, 233; Fisher v. McGirr (*Boni judicis*, etc.).

Omission of material allegations fatal to a pleading. L.C. 5, 2, 232.

Statutes conferring privileges on the members of universities mean only the members of the universities of Oxford and Cambridge, unless otherwise expressed. Jones v. Smart, *supra; Expressio unius*, etc.; *Ita lex scripta est.*

Cy pres construction; doctrines. Bro. Max 569, n.; Jackson v. Phillips (1867), 14 Allen 571, 19 L. R. A. 428; 2 Kent 237; 1 Wash. R. P. 76; 2 *id.* 719; 3 *id.* 276, 515-522; Tilden v. Green (1891), 130 N. Y. 29, 21 Am. St. 427, 14 L. R. A. 33 (doctrine of, rejected). *Expressio unius*, etc.

CASUS OMISSUS ET OBLIVIONI DATUS dispositioni communis juris re.inquitur: A case omitted and forgotten is left to the disposal of the common law. See *Lex non exacte*, etc.

CATALLA REPUTANTUR INTER MINIMA in lege: Chattels are considered in law among the minor things. Jenk. Cent. 52. *See* Pusey v. Pusey. Chattels are not of the dignity of life, liberty and real estate. Semayne's Case; *Domus sua*, etc. Upon this feudal idea (Hughes' Conts. 26) many rules of procedure are influenced. Statutes attach the greatest dignity to the freehold, and in states having intermediate appellate courts, often provide that the highest court shall review questions relating to the freehold franchise and constitutional questions, as if these could be partitioned. Equity has long more readily protected realty than personalty. Until the *Pollock Case*, injunctions were not allowed to protect personalty from tax sales. *Res adjudicata* does not protect from successive suits affecting realty as in cases of personalty. The trend of enlightened legislation has not respected so many of the old feudal notions as formerly.

CATCHING BARGAINS: Chesterfield v. Janssen; Huguenin v. Baseley; Bouv. Dic. *Cited*, §§ 13, 108, 109, Hughes' Conts. *See* ATTORNEYS. Expectancy. 1 Bouv. Dic. 797.

CATER v. DEWAR (1785), 2 Dick. 657, 21 Eng. Reprint, 426. Interlocutory orders are not *res adjudicata*. See *Res Adjudicata*. (About this rule Lord Thurlow called upon the bar, and sought its advice.) § 122, Hughes' Proc.

CAUSA PROXIMA NON REMOTA spectatur: The immediate and not the remote cause is to be considered. Bacon, Max. Reg. 1; *In jure non remota*, etc.; "Squib Case"; Hadley. *See* Woodward v. Miller (privity). Remoteness. Gilson.

CAUSATION: Labatt, Mas. & Serv. 802*a*, 815. *See* NEGLIGENCE; *In jure non remota*, etc.

CAUSE OF ACTION: Necessarily involves the basic right to appear and to ask for official aid. For this there must be demonstration or description according to the ceremonies and requirements of the law; until these are satisfied a court has no right or authority to proceed. Courts are created and ordained to consider and decide certain matters properly laid before them, and for nothing else. Their authority and right to proceed must appear from the record which limits and restrains their action. This record is to a court what the power of attorney is to the agent. Consequently appears the importance of the rule, "What ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud.; Planing Mill Co.: 2*d*; *see* ALLEGATIONS;

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Campbell v. Greer: 2*a*; Mallinckrodt: 12*a*.

A wrong must exist when suit is brought. Osborn; *Fabula.* And it must be alleged in order to invest the court with jurisdiction. Codes most minutely prescribe this requirement. *See* Story; *De non*, etc.; *Verba fortius;* 64 Cent. L. J. 128-134, 169-174.

Decisions that hold that pleadings can be waived are opposed to the foregoing views. *See* THEORY OF THE CASE; ILLINOIS; MISSOURI; L.C. 1-21, 79: cases; Schubach v. McDonald (1903), 179 Mo. 163, 101 Am. St. 452, 65 L. R. A. 136 (a cause of action need not be stated); Hume (Colo.); 23 Cyc. 1094.

Statutes cannot create. Scott v. McNeal; Taylor: 219*a*.

The facts and elements creating a cause of action must arise from the principles of the prescriptive constitution. See *Ex nudo pacto non oritur actio; Non hæc in fœdera veni.*

Same cause of action; what is; identification. Harris v. R. R., 78 Ga. 525; 40 Chicago Legal News, 28 *et seq.*; Guedel: 74*a*.

For the cause of action the general demurrer searches the record and attaches to the first fault, which can never be waived or condoned. Hughes' Proc. 7-12; Campbell v. Porter: 2. The ground of the general demurrer cannot be waived. U. S. v. Cruikshank: 232; S. v. Baughman: 268. *See* COLLATERAL ATTACK; *Coram judice;* Lampleigh: 301; Weltmer: 268*a*; Beaumont: 367.

The statement must describe a cause of action in order to invest a court with jurisdiction of a subject-matter to adjudicate it. See PLEADINGS; ALLEGATIONS; ASSIGNMENT OF ERRORS; *Debile*; CERTAINTY; *Caveat emptor.*

A change of description is a change of the cause. Guedel v. P.: 74*a*; *See* AMENDMENTS.

There must be a real bona fide cause of action and it must be described. Sham, moot, mythical cases cannot be entertained, for there is nothing to decide. Wonderly: 102; Graver: 103; *Fabula; Audi.*

A cause of action must be described by proper allegations or assignment of errors. What is not juridically presented cannot be judicially considered. Guedel: 74*a*. § 53, Gr. & Rud. (Convenience); Murray: 219; §§ 7-12, Hughes' Proc. *See* JURISDICTION.

Vitals of a coram judice proceeding. §§ 33, 226, 267-268, 246, Gr. & Rud.; *Fabula; Quod lex non;* Weltmer: 268*a*.

Sham and false pleadings do not present anything for a court to consider. Weltmer; *Fabula,* etc. §§ 52, 60, Gr. & Rud.

CAVEAT EMPTOR: Let a purchaser beware. Bro. Max. 768-810; 2 Mech. Sales 1311-1360; 9 Cyc. 427; 20 Cyc. 49-65; *cited,* §§ 46, 101, 124, 128, 201*a*, 202, 220, 235, 260, 286, 289*a*, 292, 294, 296, 302, Gr. & Rud.; *see* Pasley; Laidlaw.

Leading Cases: R. v. Wheatley; Chandelor; Pasley: cases 19, 374, 376; Laidlaw v. Organ (Am. case); Carter v. Boehm (the assured must take care of the underwriter), *cited,* Benj. Sales; McQuaid v. Ross (1893), 85 Wis. 492, 39 Am. St. 664: cases; 22 L. R. A. 187-198, ext. n.; *see* L.C. 375-383: cases, Hughes' Proc., Hughes' Conts.

It is closely associated with constructive notice and collateral attack. Clem: 2*c*; Windsor: 1, and consequently with *Ignorantia legis,* also *Simplex commendatio, Volenti,* and *Vigilantibus. See* CAUSE OF ACTION.

Caveat.—

Caveat emptor is a very important branch of contract law. See L.C. 374-384: cases; Whitworth v. Thomas; *see* WARRANTY; DECEIT; MISREPRESENTATION. It is also interwoven with the conserving principles of procedure. §§ 83-104, Gr. & Rud.

Caveat venditor: Let the seller beware; *Caveat viator:* Let the wayfarer beware.

A vendor may praise his land. Simplex commendatio non obligat. His statements as to its productiveness and uses are mere words of commendation. When the vendee goes upon the land and has the boundaries truly pointed out to him then he must judge for himself as to the acres within such boundaries. The vendor's assertion that there are fifty acres when there are only twenty-eight makes no difference. *Caveat emptor* applies. Gordon v. Parmlee (1861), 2 Allen, 214; R. v. Wheatley: 19 (one must measure, estimate and judge for himself).

Where the facts are presented from which judgment can be made then the seller is not his "brother's keeper" as is an innkeeper or a carrier. The duties of the seller are like those of the owner of premises upon which one enters. Indemaur v. Dames.

Laidlaw v. Organ (1817), 2 Wheat. (U. S.) 178, 4 L. ed. 214; Huff. & W., Conts. 282 (the great American leading case); stated, 1 Pars. Conts. 578; *cited,* §§ 13, 101, Hughes' Conts.; 2 Wh. Ev. 1138, 2 Benj. Sales 640, 668, 726; Ans. Conts. 134; Bigl. Frauds, 32, 1 Sto. Eq. 148, 149, 192, 197, 207, 211; 2 Kent, 484; Bisph. Eq. 206, 213, 2 Pom. Eq. 886, 890, 903, 904, 1 Perry, Trusts 171, 180; Slaughter v. Gerson (1871), 13 Wall. 379; 2 Beach Conts. 1437, 1439; 2 Kent 485; Bish. Conts. 664; Reynolds v. Palmer (1884), 21 Fed. 433-458, ext. n.; McQuaid v. Ross (1893), 85 Wis. 492, 39 Am. St. 664, n.: cases; 22 L. R. A. 187-198, ext. n. (buyer of a bull for breeding, both parties being ignorant of his impotency, buys *Caveat emptor*), 1 Beach, Conts. 279; Briggs v. Hunton (1895), 87 Me. 145, 47 Am. St. 318, n. (a stallion not warranted sound); Keates v. Cadogan, *sub* Cleves v. Willoughby; Tacoma Coal Co. v. Bradley (1891), 2 Wash. 600, 26 Am. St. 890, n. (inspection does not place purchaser out of his warranty rights; express warranty will not cover visible defects); Handy v. Waldron (1894), 18 R. I. 567, 49 Am. St. 794 (action lies if purchaser could inspect, but still was misled).

Fairbank Canning Co. v. Metzger (1890), 118 N. Y. 260, 16 Am. St. 753, n. (what sufficient to constitute warranty).

Concealment of facts; no duty to disclose. When parties deal at arm's length each must beware, and judge for himself. Laidlaw, *supra;* stated, 147 U. S. 428; Ward v. Hobbs, L. R. 3 Q. B. 162 (one buying diseased pigs must beware); Keates v. Cadogan, *sub* Cleves v. Willoughby: 383; 2 Benj. Sales, 636-786; 2 Kent, 482-491; Carter v. Boehm.

Warranty, Simplex commendatio non obligat: Mere commendation raises no obligation. Seixas v. Woods (1804), 2 Caines, 48; Hecker's Cas. Warranty, 274; 2 Kent, 485; 1 Beach, Conts. 244-296. This maxim affords a seller large immunity for his concealment and commendation.

Caveat.—

Right to rely upon representations made to effect contract as a basis for a charge of fraud. Fargo Co. v. Fargo Gas, 4 N. D. 219, 37 L. R. A. 593-616, ext. n.; Whitworth, *post.*

Judicial and execution sales. Maxim applies to. Gilman v. Tucker (1891), 128 N. Y. 190, 13 L. R. A. 304, n.; Upham v. Hamill (1877), 11 R. I. 505, 23 Am. Rep. 525-527.

A purchaser under judicial and quasi-judicial proceedings is charged with constructive notice of all defects in judgments and decrees, and also of their foundations, even of defects in the pleadings, and generally of all defects shown by the mandatory record. CAUSE OF ACTION.

See Windsor: 1; Horan: 85; Campbell v. Greer: 2*a*; Campbell v. Porter: 2; Clem: 2*c*; CONSTRUCTIVE NOTICE; COLLATERAL ATTACK; Deputron: 121: cases; Walker v. Turner: cases, L.C. 118; §§ 5*b*, 6, Hughes' Proc.

The rule that the general demurrer searches the whole record and attaches to the first substantial fault means what it says. L.C. 2. It is the basis of the motions in arrest, and of *non obstante veredicto*, and of collateral attack. *Debile. See* §§ 20-22, 27*a*, 28, Hughes' Conts.

Release from bid; when a court will decree. Latimer v. Wharton (1894), 41 S. C. 508, 44 Am. St. 739, n.; Hammond v. Caillaud (1896), 111 Cal. 206, 52 Am. St. 167 (misrepresentation affecting).

Probate sales, also. Thompson v. Munger 1855), 15 Tex. 557, 65 Am. Dec. 176-179, n.; notes 70 Am. Dec. 572-586.

Purchaser at judicial and execution sales; what he must look to. Voorhees: 119; *Utile per inutile*, etc.; Dorrance v. Raynsford (1895), 67 Conn. 1, 52 Am. St. 267; Bloom: 226; Ransom; Harvey; L.C. 122, 123.

In rem proceedings. Maxim applies to. Wap. Proceed. in Rem, 121-132. Tax sales. Detroit v. Martin (1876), 34 Mich. 170, 22 Am. Rep. 512-521, ext. n.; Bd. Co. Comm. v. Goddard (1879), 22 Kan. 389, 399; Lynde v. Melrose (1865), 10 Allen, 49; Rogers v. Inhabitants, 58 Me. 390, 4 Am. Rep. 292-295; Peyser, 70 N. Y. 497, 79 N. Y. 621, 26 Am. Rep. 624-627: cases, 1 Beach, Pub. Corp. 232; 2 *id.* 1190-1192, 1133; 2 Dill. 1142-1146; New. Eject. 122, n., 28 Am. St. 19; Welty, Asses., § 25; Bd. Co. Comm. v. Armstrong (1883), 91 Ind. 529, 2 Cool. Tax. 922-926.

No recovery for voluntary payments. Lamborn. *See* VOLUNTARY PAYMENTS; 6 Am. & E. Encyc. 87-89.

Right to recover money paid at void tax sales. Pennock v. Douglas Co., 39 Neb. 203, 42 Am. St. 579-591, ext. n.; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565; 2 Beach, Pub. Corp. 230-239, 1622-1643; 2 Dill. 939-947, 4 L. R. A. 300-305, n.

Commercial paper. Swift. Implied warranty of genuineness of paper accompanies it without indorsement. 10 A. & E. Encyc. 164: cases, 2 Rand. Com. Paper, 753.

"Without recourse" nevertheless warrants genuineness of paper and that it remains unpaid. Dumont v. Williamson (1869), 18 Ohio St. 515, 98 Am. Dec. 186-190; Watson v. Chesire (1865), 18 La. 202, 87 Am. Dec. 382-391, ext. n., 1 Gr. Ev. 207. Warrants genuineness of all previous indorsements. Rhodes v. Jenkins (1892), 18 Colo. 49, 37 Am. St. 263, n. It warrants the foundation for a judgment, but not the solvency of a maker. *Expressio eorum*, etc.; Strauss v. Hensey (1895), 7 Ap. D. C. 289, 36 L. R. A. 92-97, ext. n.; Gompertz v. Bartlett (1853), 2 El. & Bl. 849 (75 E. C. L. R.), 2 C. L. Rep. 395, 24 E. L. & Eq. 156; stated, 98 Am. Dec. 189, 18 Ohio St. 188. § 287, Hughes' Proc.

Seller of a note warrants his title, and that it is genuine. Hecht, 147 Mass. 335, 9 Am. St. 708.

Delivery without indorsement warrants genuineness. 1 Dani. Nego. Insts. 735, Sto. Prom. N. 118, 2 Pars. N. & B. 37, 3 Rand. 1779. *See* Otis v. Collum (1876), 92 U. S. 417; Meyer v. Richards (1895), 163 U. S. 385-415: cases. *Citing* Gompertz v. Bartlett, *supra;* 41 L. ed. 199.

Municipal warrants; title to, is also implied. 2 Rand. Com. Paper, 756. Constitutionality also. Railroad Cos. v. Schutte (1880), 103 U. S. 118. Coupons of, also. McCoy v. Barber (1867), 37 Ga. 423.

Measure of damages where paper is a forgery. Meyer, *supra;* Merriam v. Wolcott, 3 Allen 258, 80 Am. Dec. 69, n. Generally of commercial paper. 2 Rand. Com. Paper, 752-758.

The rationale of this maxim is perceived in Bassett, Le Neve, L.C. 395, 396; Bell v. Twilight, and in varying degrees in *Swift.*

One buying real estate in the possession of another is charged with notice of the occupant's rights. The last case relates to the rights of a purchaser of commercial paper, wherein *Caveat emptor* is not so strictly applied as elsewhere, and certainly not as in marine insurance. Carter.

Also, it may be discerned in agency. Boed v. Pontiac R. R. (1886), 62 Mich. 653, 4 Am. St. 885; Schimmelpennich v. Bayard (1828), 1 Pet. 264; Lister v. Allen (1869), 31 Md. 543, 100 Am. Dec. 78, n.; Wade, Notice, 657, Whart. Ag., § 227, Sto. 72.

One dealing with an agent must take notice of his powers. Clark v. Des Moines; Sturdivant: 410. An agent can only bind when he has power, real or apparent. *Allegans contraria*, etc. An assumed agent —one never invested with power—warrants that he has that power, and he is liable on his warranty. Collen; Polhill. If he once had power but it has since terminated, as by death, and this fact was unknown, then the agent is not liable—the loss, if any, is the dealer's. Smout. Here the agent's absolution results from blended rules. *Actus Dei*, etc., *Ignorantia facti*, etc., and *Caveat emptor.*

Sales by sample. Bradley v. Manly (1816), 13 Mass. 139; 1 Pars. Conts. 585, 1 Chit. Conts. 637-641; Laing v. Fidgeon (1815), 6 Taunt. 108 (1 E. C. L. R.); 1 Pars. Conts. 587; Brown v. Edington (1841), 2 Man. & Gr. 279 (40 E. C. L. R.); stated, 1 Pars. Conts. 587, 21 Fed. Rep. 433, n.; Gould v. Stein (1889), 149 Mass. 570, 14 Am. St. 455, 2 Benj. Sales, 969-981; Jones v. Just, L.C. 376. Drugs. Thomas v. Winchester; 2 Benj. Sales, 1009. Provisions. Hunter v. S. (1858), 1 Head (Tenn.), 160, 73 Am. Dec. 164, ext. n. Farmers not dealers who kill and sell hogs to dealers for domestic use do not warrant them. Giroux v. Stedman (1888), 145 Mass. 439, 1 Am. St. 472; 2 Benj. Sales, 996; Craft v. Parker (1893), 96 Mich. 245, 21 L. R. A. 139, n. (drugs and food); 87 Me. 145, 47 Am. St. 318: cases. A restaurateur not liable for unwholesome victuals. Sheffer v. Willoughby (1896),

Caveat.—
163 Ill. 548, 34 L. R. A. 464, 54 Am. St. 483, n. Criminal to sell adulterated food and drink. 1 Bish. C. L. 491; Bish. Stat. Crimes, 358.
Selling infected, diseased cattle is within the maxim. 1 Add. Torts, 6, 7. But if sold with warranty, vendor is liable for consequences. Hadley v. Baxendale; Knowles v. Nunn (1866), 14 L. T. R. N. S. (Q. B.) 592; Sedg. L. C. Dam. 345, 2 Benj. Sales, 1000; Ashby; Warren v. Buck (1898), 71 Vt. 44, 76 Am. St. 754.
One buying of a trespasser or thief buys Caveat emptor. Bentley.
Public and private wrongs; when deceit is criminal. R. v. Wheatley, 1 B. & H. Lead. Crim. Cas. 1-34; Breese (Ill.), 103.
Cases that lead and are widely cited and which deserve most attention are: R. v. Wheatley, Chandelor, Pasley, Jones v. Just to Cleves, Clark v. Des Moines, and Sturdivant.
Buyer is not bound to disclose what he knows. Whart. Conts. 251. *Neither party is bound to correct the other party's unexpressed misconceptions.* Whart. Conts. 252.
Seller of real estate liable for misrepresentations of title although record shows mistake. Hunt v. Barker (1900), 22 R. I. 18, 46 Atl. 46, 84 Am. St. 812, n.
Caveat emptor is only a general rule to which there are many exceptions, as marine insurance, sale of drugs, provisions and by sample. For convenience (§ 53, Gr. & Rud.) the exceptions exist. A study of the subject well illustrates how construction expands or contracts according to the subject-matter.
Generally a warranty is a collateral contract; if it is stipulated for it should be by express terms and free of ambiguity; a warranty stipulation can not be proved by oral evidence when the contract is in writing. *See* ORAL EVIDENCE.
CAVENDUM EST: See *In pari materia.*
CEMETERIES: 6 Cyc. 708-723; Burials; removals; injunction relief. Wormley (1904), 207 Ill. 411, 3 L. R. A. (N. S.) 481-496.
CERTAINTY: Defined, §§ 60-61, 162-164, 235-241, 273-279, Gr. & Rud.
The vesting of a jurisdiction depends on. U. S. v. Cruikshank: 232; Moore v. C.: 21; §§ 56-61, Gr. & Rud. *See* CAUSE OF ACTION.
What is not made juridically to appear cannot be judicially considered. De non, etc.; *Verba fortius,* etc.; § 118, Gr. & Rud.; ALLEGATIONS.
What ought to be of record must be proved by record, and by the right record. § 118, Gr. & Rud.
Constitutions require. §§ 152, 154, 157, 182, 219, 239-256, Gr. & Rud.
Maxims require. §§ 118, 164, Gr. & Rud.
Grounds and rudiments require. §§ 52, 56, Gr. & Rud.
Conserving principles of procedure, also. §§ 85-91, 96, 115-119, 137-140, 163-164, 182, 207, 219, 239, 241, 278, Gr. & Rud.
All kinds of cases and official action require. §§ 59-61, 96, 122, 113, 115, 118, Gr. & Rud. *See* COLLATERAL ATTACK.
Criminal cases not more strict than civil. §§ 96, 115-118, 122, 142-144, 159, 202, 232, 273, Gr. & Rud.
Protection under a record depends on certainty. §§ 59-61, 118, Gr. & Rud.
Codes are most strict. §§ 118, 142, 160-164, 202, 207, 227, 233, 239-256, 244, 278, Gr. & Rud.

Certainty.—
A constitutionalism depends upon a record; this record is made by various hands and thus involves the division of state power, the first great basic principle of a defined government. This is a ground and rudiment of law. §§ 59, 239, 243-246, Gr. & Rud. Such a record must be certain; for an uncertain record is no defining or limiting record, consequently the rule, that a court is bound by its record, would fail. From this viewpoint the grounds for excluding the conclusion of law, the general issue and the uncertain denial should be perceived. §§ 237-256, Gr. & Rud.
The conclusion of law, the equivocal, or repugnant, or argumentative allegation, the general denial, the general issue, the general objection and general exception and assignment of error implicate the question of jurisdiction. § 53 (convenience), Gr. & Rud.
CERTAINTY involves the record as an essential for a constitutionalism, the necessity for constancy of construction, and *stare decisis.* Argument for uncertainty is inadmissible for the means of arbitrariness. The stability and usefulness of the conserving principles depend upon certainty. The ephemeral claim of feudal authors, among these Coke, that there are three degrees of certainty has been made the basis of emasculating construction, as observed in relation to Windsor: 1; J'Anson: 91; Dovaston: 217. In the last named case the claim is expressly denounced.
Certainty is a juridical element of universal importance. It affects all the leading subjects, procedure, equity, contracts, crime, tort and construction. A view from its maxims suggests its mystic influence. Among these are *Certa debet esse intentio, et narratio et certum fundamentum. et certa res quæ deducitur in judicium* (the intention, count, foundation and thing brought to judgment ought to be certain. Sto. Pl. 240); *De non apparentibus,* etc.; *Certum est quod certum reddi potest; Falsa demonstratio non nocet; Incerta pro nullis habentur* (things uncertain are held for nothing); *Ubi jus incertum, ibi jus nullum* (where the law is uncertain there is no law); *Allegans contraria non est audiendus; Expressio unius est exclusio alterius. See* § 53 (Convenience) Gr. & Rud.
Allegations must be certain in all systems. They are construed by the same "metwand" which may be expressed in what is elsewhere called the constitutional, the mystic and the *coram judice* rules.[1]

1—*See* CONSTRUCTION; CODES; *Frustra probatur,* etc. *Dolus.*

Certainty.—

The last two maxims are very important, and are: *Every presumption is to be made against a pleader* and *A court is bound by its record.* These maxims, namely, *Verba fortius accipiuntur contra proferentem* (the words of an instrument are construed against the maker) and *De non apparentibus et non existentibus eadem est ratio* (where a fact is not made juridically to appear it cannot be judicially considered). In this connection *Story's Pleadings* (§ 10, 239-260) should be carefully read and considered and ever kept in view.[2]

There is much discussion of the three degrees of certainty. (Sto. Pl. 240.) These degrees are not considered practical; they are too academic and quite too refined; "they are a jargon of words" (*Dovaston v. Payne*).[3] Instead of them this is offered, that whatever is sufficient to maintain the conserving principles of procedure is sufficient certainty; if not sufficient for them then there results the *coram non judice* proceeding.[4]

The maxim of regularity[5] aids to avoid prolixity and the pleading of evidence, but only this far, *e. g.*, in a bill for a specific performance of a contract, if it be allowed to be in writing, it is not necessary to allege it to be signed by the party; but it will be presumed to be signed.[6] Now, observe that this is a rule in equity, also in specific performance which surpasses in strictness all other pleadings,[7] even perjury in the criminal case. If Story intended to say equity pleadings are not the most strict, then he is mistaken. His *section ten* is broad, but when he limits the functions of pleadings to "apprise the adverse party,"[8] this narrow, insufficient definition of pleadings has misled supposed great authors and courts into ruinous error, and to make the gravest attacks upon the three rules already mentioned, which lie at the base of jurisprudence.[9]

Reasonable certainty is sufficient, or *certainty to a reasonable intent is sufficient, is the true rule.* The rule of reason is always the law, in all ages and among all nations. If this is sufficient in a specific performance case (in equity of course) then it is in all relations and in all systems.[10]

Civil and criminal pleadings are governed by the same "metwand."[11] There are many general and loose expressions to the contrary, but if we triangulate from the conserving policies this conclusion is irrefragable. Before the rights of parties are considered the mandatory requirements of a constitutionalism must be respected.[12]

Denials must be certain. Under the equity and code systems they must be certain, specific, positive, full and conscientious. The libel and the answer thereto in admiralty commend themselves for conciseness, precision and directness. The charges against Lord Bacon and his responses thereto suggest much to those who believe that pleadings should be servitors of justice and not be made instruments of chicane and covin.[13] General allegations if conclusions of law, general denials and the general issue are opposed to the genius of the civil law and its derivative systems. Ambiguous denials are construed against the pleader; denials must be certain, direct and positive. A plea of confession and avoidance overcomes a general denial (Dickson v. Cole: 34: cases). Denials must be *bona fide* (Graver v. Faurot: 103).

Issues must appear from the record with certainty. They arise from the allegations and the denial. For the issue these must be certain and not repugnant, equivocal, ambiguous, in the alternative or hypothetical. Jurisdiction depends on these matters. Munday: 79 (there must be an issue

2—*See* also, 1 Gr. Ev. 63; U. S. v. Cruikshank: 232; Moore v. C.: 21; Dovaston v. Payne: 217; Rideout v. Winnebago Co.; Pain: 107; Guedel: 74*a*; Campbell v. Greer: 2*a*.

3—Bouv. Dic.: CERTAINTY; Sto. Pl. 240; Hughes' Proc. 187.

4—Cruikshank; Moore v. C.; Rideout; § 4, Hughes' Proc.

5—*Omnia præsumuntur rite*, etc.

6—Dunn v. Calcraft, 2 Sim. & Stu. 56; Cozine v. Graham, 2 Paige, 277; Sto. Eq. Pl. 253.

7—Lester v. Foxcroft: 341.

8—Sto. Eq. Pl. 241, 257.

9—*See* THEORY; 2 Thomp. Tri. §§ 2310, 2311 (pleadings can be waived).

10—Hughes' Proc., §§ 84, 187.

11—*Id.* 82; 1 Gr. Ev. 65; §§ 96, 115-118, 122, 142-144, 159, 202, 232, 273, Gr. & Rud.

12—Lane v. Dorman (Ill.); Planing Mill Co. v. Chicago: 2*d*; Austin R. R. v. Cluck; Rideout; *see* CODES.

13—Robinson v. Raley: 45.

Certainty.—
in the right record); Dickson: 34 (there must be a certain denial; pleas of confession and avoidance overcome a general denial; every presumption is against a pleader).

Certainty in appellate procedure. There are four important documents that involve many discussions of certainty. These are, namely, the mandatory and the statutory records, the assignment of errors and the argument or brief. These are elsewhere mentioned. The functions of each of those documents should be carefully considered from appellate procedure, construction, waiver and abatement discussions. *See* ALLEGATIONS; ASSIGNMENTS OF ERROR.

The functions, the range, and the effect of the statutory record depend upon the motion for a new trial, and the assignment of errors. L.C. 296-299.

Judgments must be certain and so appear from the record entry. If uncertain as to amount or parties, etc., they are void.

Taxation proceedings must be certain. Owner's property and amounts must be certain. L.C. 132, 133.

Identification of matters is a leading essential throughout. All matters above mentioned involve and depend upon it. From its necessity description must be sufficient and certain. The conclusion of law does not describe, therefore it is insufficient to confer jurisdiction. Pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it. Therefore it must be sufficiently described. U. S. v. Cruikshank; Rideout v. Winnebago Co.

Certainty, identification, description must be comprehended from the conserving principles of procedure. They are the "metwand" of certainty. What is sufficient certainty for them is all that is required. The standard is not what will apprise the adverse side of what they must meet at the trial, as almost all authors state, also many decisions. Guedel: 74*a*. This is a false and misleading standard. Looking from any one of the conserving principles the fallacy of that standard will appear. That fallacy is enough to overwhelm and to substitute a different jurisprudence. From this viewpoint the importance of the record or constitutional rule, the mystic and the *coram judice* rules will appear. Until these are clearly perceived and rightly understood no right progress can be made in procedure. Until then procedure must be borne down in the marsh and silt of discussion and dissensions as referred to in relation to *Dovaston:* 217.

Courts are bound by their records, which must be certain. L.C. 1, 79; §§ 28, 29, 35, 45, Hughes' Proc.

Certainty is inseparably connected with the grounds and rudiments of law and the conserving principles of procedure. It should be considered with construction, codes and pleading.

It is an important element in contract law. Kelly: 304-306. *Expressio unius,* etc.; *Non hæc in fœdera veni.* Also in crimes. Cruikshank: 232; Moore v. C.: 21; R. v. Wheatley: 19.

See Hughes' Proc. pp. 474-477; ALTERNATIVE; AMBIGUITY; ALLEGATIONS; CONSERVING PRINCIPLES. Also, L.C. 1-299.

CERTIFICATE OF DEPOSIT: Hillsinger v. R. R., 108 Ga. 357, 75 Am. St. 42-61, n.

CERTIFICATE OF DOUBT: *A speedy, convenient and economical remedy in appellate procedure.* 3 Encyc. Pl. & Pr. 914-917; British Co., 91 Tex. 414, 66 Am. St. 901 (form of proceedings). *Certificate of question for review.* Waco Water: L.C. 300.

Must clearly present question with certainty. Lurking questions in the record will not be considered. Cross v. Evans (1896), 167 U. S. 60. *Generally: See* Bouv. Dic., AUTHENTICATION.

CERTIFICATES: Of officers can include no fact not designated by statute. Bouv. Dic.; 1 Gr. Ev. 498; U. S. v. McCoy, 193 Me. 593; 3 Wigm. Ev. 1630-1684.

Defects in acknowledgments. Trecise, 13 Mont. 244, 108 Am. St. 578, ext. n.; Duvall v. Ellis.

But recitals in a judgment, although surplusage, bind. *See* Cooper v. Reynolds.

CERTIFIED CASES: *See* CERTIFICATE OF DOUBT; OF QUESTION; Murray: 219; 2 Cyc. 740-756.

CERTIORARI: Wulzen v. Board of Commissioners (1894), 101 Cal. 15, 40 Am. St. 17-46, ext. n.; Duggen, Walker, 112, 12 Am. Dec. 527-537, ext. n.; Mayor, 7 Martin (N. J.) 1, 18 Am. Dec. 232-241, ext. n.; De Greayer, 117 Cal. 640, 59 Am. St. 220, n.; Mech. Pub. Off. 999-1011; Cool. Tax. 75 (2d ed.); 1 Bish. Cr. Proc. 1375-1381; 4 Encyc. Pl. & Pr. 1-335. *See* PROHIBITION; Bailey, Jurisdic. 409-444; Hayne, Appeal, 302-310; Brown, Jurisdic. 621-628; Bouv.; And. Dic.. 6 Cyc. 737-842. To review evidence to see if jurisdiction was exceeded. McClatchy v. Superior Court (1897), 119 Cal. 413, 39 L. R. A. 691; also when one may appeal if a justice acts illegally. White v. Wagar; P. v. Murray (1896), 89 Mich. 276, 9 Am. Crim. Rep. 719 (remedy when one is denied a public trial. Bill of exceptions unnecessary. Exceptions to the rule that *certiorari* will not lie when there is no appeal. Hamilton v. Guinotte (1900), 156 Mo. 513, 50 L. R. A. 787, n. Whitney v. Dick (necessity must call for). Who may prosecute. Elliott v. Court, 144 Calif. 501, 103 Am. St. 102-117, ext. n. Forms for. 2 Fost. Fed. Prac. 1334.

CERTUM EST QUOD CERTUM REDDI potest: That is sufficiently certain which can be made certain. Bro. Max. 623-626. Suth. Stat. 260; R. v. Waters; Hines. *See* CERTAINTY; AIDER BY VERDICT. *Ut res*, etc.

Max. No. 22, §§ 237-250*c*; *cited*, §§ 185, 187, 219, 222, 228, 237, 238, 246, 247, 262, 264, 277, 282, Hughes' Proc.; §§ 164, 271, Gr. & Rud.

A notice is sufficient if its object cannot be mistaken. 94 Va. 146, 36 L. R. A. 271; *Falsa demonstratio*, etc. *See* AMBIGUITY.

Which party is plaintiff will not be inferred from a caption of complaint that does not state. 41 Kan. 288, 13 Am. St. 281. Codes require that the caption expressly show which is plaintiff and which is defendant.

Description of lands in deeds must be sufficient. Wallace, 106 U. S. 260, 2 L. ed. 147, n., 2 Dev. Deeds, 1010-1046; Sedgk. & Wait, Trial of Title, 455-464 (ejectment). And likewise in taxation records. Tilton: 133, 126, 268.

Mortgages to secure future advances are valid. Ladue v. Detroit R. R. (1865), 13 Mich. 380, 87 Am. Dec. 759, n.; 51 N. J. Eq. 605, 40 Am. St. 539, n.; 1 Beach, Eq. 420; 3 Pom. Eq. 1190-1197; 4 Kent, 175, 176, n.; 1 Jones, Mort. 369-379; Shirras, 7 Cranch, 34.

Description of debt in mortgages is sufficient, if not misleading. Dunnell v. Terstegge (1864), 23 Ind. 397, 85 Am. Dec. 466; Jones, Mort. 343-349.

Chattel mortgages; description of chattels; what sufficient. Parker v. Chase (1890), 62 Vt. 206, 22 Am. St. 99, n.; Barrett v. Fisch (1889), 76 Iowa, 552, 14 Am. St. 238-247, ext. n. *See* CHATTEL MORTGAGE.

CESSANTE RATIONE LEGIS CESSAT ipsa lex: Reason is the soul of the law and when the reason of any particular law ceases, so does the law itself. Bro. Max. 159-163; *Green v. Liter* (1814), 8 Cranch, 229, 249; 108 U. S. 3; 114 U. S. 270-288 (*ratio decidendi* sought), Church v. U. S.; Lathrop; Campbell v. Race; Cargill; Bickerdike; Le Neve; Leigh v. Green (1901), 62 Neb. 344, 89 Am. St. 751, 1 Cool. Bl. 41, 42; End. Stat. § 182; 1 Bish. C. L. 273, 275, 805. *Quæcunque intra rationem*, etc.; *Ratio*, etc.; *Scire proprie est rem ratione*, etc.; *Verba nihil*, etc.

Max. No. 35, *cited* §§ 322-325, 26, 287, 318, Hughes' Proc.; §§ 57, 77, 164, 178, Gr. & Rud.

Estates by the entirety abolished in consequence of statutes changing the wife's status. 60 Neb. 663, 83 Am. St. 550; *Concordare legis*, etc. *See* REASON; §§ 26, 59, Hughes' Conts.

When the nature of things changes the rules of law must also change. Shayne, 168 N. Y. 70, 85 Am. St. 654.

Woman being emancipated, her marriage does not now revoke a will, as formerly. Kelly, 85 Minn. 247, 56 L. R. A. 754.

When the range of cannon was only three miles, that was the limit of sovereignty beyond the low-water mark; but when the range became ten miles, then there is reason for an increased limit. *Modica circumstantia*, etc. One may waive the stern and peremptory requirements for written notice by appearing. Thomas v. Bank, *Consensus*, etc.

CHALLENGE; CHALLENGING OF JURORS. P. v. Mather (1830), 4 Wend. (N. Y.) 229, 21 Am. Dec. 122-154, n.; Bouv. Dic. *See* JURORS; Am. Crim. Rep.

CHAMPERTY: Weeks, Attys. 38; Bouv. Dic.; 3 Mews' E. C. L. 201-218. *See* **Champerty.—**

BARRATRY. 68 Minn. 74, 64 Am. St. 456, n.; Johnson v. Van Wyck (1894), 4 App. D. C. 294, 41 L. R. A. 520, n.; Greer v. Frank (1899), 179 Ill. 570, 45 L. R. A. 110 (agreement to pay costs, is); And. Dic.; 83 Am. St. 159-187; *In re* Evans (1900), 22 Utah, 366, 83 Am. St. 794; Thallhimer v. Brinkerhoff (1824), 20 Johns. 380, 3 Cow. 623, 15 Am. Dec. 308-322, ext. n. *Contracts for, void.* § 92, Hughes' Conts.; Ans. Conts. 186, 187.

Barratry. 2 Bish. Crim. Proced. 98-103, 3 Gr. Ev. 66, 67, Weeks, Attys. 86; Bouv.; And. Dic. *See* MAINTENANCE.

Champertous contracts with attorney. Newman v. Freitas (1900), 129 Cal. 283, 50 L. R. A. 548, n.

CHANDELOR v. LOPUS (Deceit): L.C. 374.

CHANGE AND TERMINATION: Beach, Conts. 771-788.

CHANGE OF VENUE: Shatuck, 13 Ia. 47, 74 Am. Dec. 236, n., 1 Bish. Cr. Proc. 67*a*-76, Whart. Cr. Pl. 602, Clark, 144.

CHARACTER: Right to prove in a criminal case. *R. v. Rowton* (1865), Leigh & Cave, C. C. 520, 10 Cox, C. C. 25, 2 L. C. Cas. (B. & H.) 333-358, n.; 4 Mews' E. C. L., 3 Wigm. Ev. 1980-1986 (quoting R. v. Rowton), § 272, Gr. & Rud., Thayer Cas. Ev. 279; 3 Gr. Ev. 25-27; Thornton v. S. (1896), 113 Ala. 43, 59 Am. St. 97, n.; S. v. Hull (1893), 18 R. I. 1, 20 L. R. A. 509-529, ext. n.; 9 Crim. Law Mag. 443-450; Edington v. U. S., 164 U. S. 361 (41 L. ed. 467), ext. n.; Balkum v. S. (1896), 115 Ala. 117, 67 Am. St. 19, n.; S. v. Fontenot (1898), 59 La. Ann. 537, 69 Am. St. 453 (character of deceased for violence); 3 Gr. Ev. 25; 1 Wh. Ev. 49, 56; 1 Best Ev. 91, 253, 260; 20 L. R. A. 613; 1 Bish. Cr. Proc. 1112, 1117; 16 Cyc. 1263-1287; 12 Cyc. 412-418; P. v. Bonier, 179 N. Y. 315, 103 Am. St. 880-909, ext. n.

General reputation; when admissible. R. v. Rowlton, supra. Is admissible for defendant. Carr v. S. (1894), 135 Ind. 1, 41 Am. St. 408, n., 20 L. R. A. 863; 3 Gr. Ev. 25-27, 1 Bish. Cr. Proc. 1112-1120; Scott v. S. (1894), 105 Ala. 57, 53 Am. St. 100, n.; Thornton, 113 Ala. 43, 59 Am. St. 97, n.; Bouv.; And. Dic.; McClain, C. L.

Homicide; of deceased for ferocity. Powell v. S. (1897), 101 Ga. 9, 65 Am. St. 277; S. v. Fontenot, *supra*; Carle v. P. (1902), 200 Ill. 494, 93 Am. St. 208 (not admissible unless he assailed his slayer). *Res inter alios*, etc. Charge of court, assuming fact error. 1 Am. Cr. Rep. 273, 309; S. v. Croteau: 271; *Ad quæstionem*, etc.

CHARITY: 3 Mews' E. C. L. 218-443.

CHARLES RIVER BRIDGE CO. v. Warren Bridge (1829), 7 Pick. 344, 11 Pet. 420, Cum. Private Corp. 506, 2 Thayer, Const, 2 Beach, Pub. Corp., Dill., Gould, Wat., Bish. C. L., Cool., Bish. Torts, Pars. Conts., Wash. R. P., Kent, Brown, Jurisdic., 6 Cyc. 897-977, 199 U. S., Lewis, Suth. Stat.; 35 Wis. 566. *Cited*, § 221, Hughes' Proc.

Monopoly not favored. A prior franchise may be destroyed by authorized competition, *e. g.*, a toll bridge by a free bridge. S. P., Turnpike, 3 Wall. 210. A railroad cannot give an exclusive right to stand hacks at a depot. Hedding, 69 N. H. 650, 76 Am. St. 204, n.; McConnell v. Pedigo (1892), 92 Ky. 465, 5 Am. R. R. & Corp. Rep. 711-724, n.; Kalamazoo, 84 Mich. 194, 22 Am. St. 693-702, ext. n.,

Charles.—
10 L. R. A. 819; S. v. Reed (1897), 76 Miss. 211, 43 L. R. A. 134, 71 Am. St. 528, n.

CHARTA DE NON ENTE NON VALET: A charter or deed of a thing not in being is not valid. *See* SALES.

Deeds must convey something; words are not a deed unless there is something to convey. And analogously is the rule, that jurisdiction is imposed on things, not words. *See* CAUSE OF ACTION.

CHARTARUM SUPER FIDEM, MORtuis testibus, ad patriam de necessitudine recurrendum est: The witnesses being dead, the truth of charters must, of necessity, be referred to the country. *See* SHOP BOOKS; PRICE.

CHASE v. HATHAWAY (1817), 14 Mass. 222-224. Notice of suit or tax essential. It is implied. *Audi. Cited,* § 76, Hughes' Proc.

CHASEMORE v. RICHARDS (1859), 7 H. L. Cas. 349, Bigl. L. C. Torts, 524, Blanch. & W. L. C. Min. 764, 1 Rul. Cas. 729, 2 Gray, Cas. Prop. 121, 5 Mews' E. C. L., 19 L. R. A. 93, 25 Kan. 588, 37 Am. Rep. 265, Gould, Wat. 284, 2 Wat. Tres. 855, Bro. Max. 198, 10 Rul. Cas. 113, 143, 2 Gr. Ev. 230, Kent, Cool. Torts, 2 Kinkead, 676: cases; Wheatley, 25 Pa. St. 528, 64 Am. Dec. 721, ext. n. (interference with percolating water is actionable); Wheelock v. Jacobs (1897), 70 Vt. 162, 67 Am. St. 659-672, ext. n., 99 Am. St. 5, 8. *Cited,* §§ 326, 330, Hughes' Proc.

Appropriation of water; what is. 30 Or. 59, 60 Am. St. 775-817, ext. n.; Acton (subterranean water; right to; cutting off a spring supply); Beatrice, 41 Neb. 662, 43 Am. St. 711 (polluting subterranean water). See *Aqua currit,* etc.: cases; Arkwright (artificial water courses). Nuisance to water. 2 Kinkead, Torts, 668-689; Farnham, Water.

CHATTEL MORTGAGES: Property not *in esse* may be mortgaged. Moore, 10 S. C. 452, 30 Am. Rep. 58, n.; Argues, 51 Cal. 621, 21 Am. Rep. 718 (crops to be planted and grown).

Crops to be grown or goods to be bought may be mortgaged. McCaffrey, 65 N. Y. 459, 22 Am. Rep. 644, n.; note 30 Am. Rep. 63, Jones, Mort. 151; Butt, 19 Wall. 544, 1 Mech. Sales, 197, 203.

Property to be subsequently acquired; validity and effect of mortgage upon. Gregg, 24 Ill. 17, 76 Am. Dec. 719-733, ext. n.

Are void as to third persons. Williams, 11 R. I. 176, 23 Am. Rep. 518; Davis v. Ransom (1857), 18 Ill. 396.

Increase of animals, how far subject to. Funk v. Paul (1885), 64 Wis. 35, 54 Am. Rep. 576.

After-acquired property and property having only a potential existence can be mortgaged. Moody, 13 Met. 17, 46 Am. Dec. 706-718, ext. n.

Removal of property into another state does not impair mortgagee's right. Kanaga, 7 Ohio St. 134, 70 Am. Dec. 62-72, ext. n.

Stock in trade generally cannot be mortgaged. Barnet, 51 Ill. 352; notes, 41 Ill. 365; Eagell, 9 N. Y. 213, 59 Am. Dec. 532, n.

Mortgagor of stock in trade with power to sell must be obliged to apply proceeds, else mortgage is fraudulent. Eckman, 32 Fla. 367, 37 Am. St. 109, n.; Ephraim.

Recording of, in another state; effect. Aultman, 114 Iowa, 444, 89 Am. St. 373.

Chattel.—
Notice of; when sufficient. Aultman, 3 N. Dak. 193, 54 N. W. 1034, 44 Am. St. 533.

Chattel mortgages allowing the mortgagor to retain possession and sell the property. Held, void. Peabody, 61 Vt. 318, 15 Am. St. Rep. 903-917, ext. n.: cases. See note, 22 L. ed. (U. S.) 758; *Ephraim,* 4 Wash. 243, 18 L. R. A. 604-626, ext. n. See also Robinson v. Elliott (1875), 22 Wall. 513; Means v. Dowd (1888), 128 U. S. 273. Stated: 15 Am. St. Rep. 915; *Twyne's Case.*

Rights and remedies of chattel mortgagor whose property has been wrongfully sold. Wygal, 42 Kan. 447, 16 Am. St. 495-503, n.; 4 Encyc. Pl. & Pr. 507-536.

Registration of; when essential. Note 26, L. ed. (U. S.) 160, 13 L. R. A. 388. If valid where made, are everywhere. *Sub* Van Voorhis. *See* Corbett v. Littlefield (1890), 84 Mich. 30, 11 L. R. A. 95.

To secure future advances, sometimes void. Shellabarger, 47 Kan. 451, 27 Am. St. 306, n. (attorney's services yet to be rendered).

What constitutes. Herr, 13 Colo. 406, 6 L. R. A. 461, n.

Description of chattels. Certum est quod, etc. Barrett, 76 Iowa, 552, 14 Am. St. 238-247, ext. n.; Andregg v. Brunskill (1893), 87 Iowa, 351, 43 Am. St. 388, n.; Union Nat. Bank v. Olum (1892), 3 N. Dak. 193, 44 Am. St. 533, n.; *Van Heusen,* 17 N. Y. 580, 72 Am. Dec. 480, n. "Two two-year old heifers and three one-year old heifers," is void for indefiniteness, where it does not appear that the mortgagor did not own other heifers of the same age. Huse v. Estabrooks (1894), 67 Vt. 223, 48 Am. St. 810.

May be valid in part. Hayes v. Wescott (1890), 91 Ala. 143, 12 L. R. A. 488.

Description of indebtedness. Bowen v. Ratcliff (1895), 140 Ind. 393, 40 Am. St. 203-209, n.

Who are bona fide purchasers. An attaching creditor is not. Union Nat. Bank v. Olum, *supra.* Nor an assignee. Van Heusen, *supra;* Le Neve: 396.

Actual notice of, dispenses with necessity of registration in some cases. Union Nat. Bank, *supra;* 13 L. R. A. 389. *See* Cardenas, 108 Cal. 250, 49 Am. St. 84.

Deceptive description aided by actual notice. Cole, 77 Iowa, 307, 15 Am. St. 283, n.

A mortgage of property thereafter to be acquired is invalid. Steele, 40 Neb. 700, 42 Am. St. 694, n.; §§ 134, 135, Hughes' Conts.

Of property to be manufactured; validity. Deeley, 132 N. Y. 59, 18 L. R. A. 298, ext. n.

Effect of "danger," "safety" or "insecurity" clause in. Robinson v. Gray (1894), 90 Ia. 699, 23 L. R. A. 780, n.

Fixtures; mortgage. Tibbetts v. Horne (1889), 65 N. H. 242, 15 L. R. A. 56-63, ext. n.

Registration and filing equivalent to a delivery; acceptance presumed. Dempsey, 86 Mich. 652, 13 L. R. A. 388, n.

Retroactive effect of filing for record against liens acquired against. Baker v. Smelzer (1895), 88 Tex. 26, 33 L. R. A. 163, n.; Ruggles v. Cannedy (1898), 127 Cal. 290, 46 L. R. A. 371, n. (must be promptly recorded; assignee of mortgagor a creditor).

Increase of animals do not pass when mortgage is only a lien and not a conveyance. Shoobert v. De Motta (1896),

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112 Cal. 215, 53 Am. St. 207; nor wool and increase. 116 Cal. 81, 58 Am. St. 133.

Right to take possession of chattels and sell them. Singer Co., 96 Tex. 174, 97 Am. St. 901, 60 L. R. A. 143, n. (may employ force, but not disturb the public peace); Taylor v. Cole *(Salus populi)*; St. Mary's Co. v. National Co. (1903), 68 Ohio, 535, 96 Am. St. 677-695, ext. n. (right of mortgagee after condition broken).

Sale; fair price. 140 Ala. 418, 103 Am. St. 49-58, n.

Generally: 3 Add. Conts. 1035-1111, Twyne's Case: Sm. L. C.; 4 Encyc. Pl. & Pr. 507-536; Cobbey; 6 Cyc. 985-1121. *See* MORTGAGE; Bouv. Dic.

CHEATING AND FALSE PRETENSES: Bouv. Dic.; And. Dic.; 3 Gr. Ev. 84-88; 2 Bish. Cr. Proc. 157-198; R. v. Wheatley; Bennett & Heard, Lead. Crim. Cas.; Pasley v. Freeman, L.C. 375; McClain, C. L.

CHECKS: *See* COMMERCIAL PAPER.

CHERRY v. CHICAGO & ALTON R. R. (1905), 191 Mo. 489, 90 S. W. 381, 2 L. R. A. 695-708, n., 109 Am. St. 830, n.

Connecting carriers; each is agent for the other. Pa. R. R. v. Loftis. Authority of agent may arise from the nature of the business. *Qui sentit commodum.*

Ticket of carrier is strictly construed. If it requires continuous passage one way only this does not apply to the other way. *Expressio unius.* Accepting a return ticket requiring continuous passage is no rescission of the original contract. It is without consideration. It is a *nude pact.* Stilk: 313.

A valid right and a clean ticket not always required. *See* K. C. R. R.: 357. Agreement to pay fare over if dispute arises and leave it to a designated person for settlement is not binding on a passenger.

Passenger not bound to minimize loss by repaying fare to avoid expulsion. *See* L.C. 357.

Public policy dominates contracts of carriers. N. Y. Cent. R. R. v. Lockwood cited and approved; L.C. 350-357; *Salus populi.*

CHESTERFIELD v. JANSSEN (1751), 1 Atk. 361, 26 Eng. Reprint, 191, 28 *id.* 82, 81 Am. St. 664, 2 Ves. Sr. (Eng.) 125, 1 Wils. 286, 3 Atk. 301, 1 Lead. Eq. Cas. 773-836, ext. n., 18 Rul. Cas. 289; 132 U. S. 406; 33 L. R. A. 281, Brown, Jurisdic., Beach, Bish., Pars., Page, Conts.; 2 Pars. N. & B. 406, 413, Gr. Pub. Pol. 52, 144, 175, 750, Bigl. Pr. 275, 476, 2 Pom. Eq. *q. v.*, 1 Sto. Eq. *q. v.*, Bisph. Eq. 24, 205, 220, 229, 2 Kent, 283, 1 Beach, Eq. Prac. 64, 144; Howells, 21 Utah, 45, 81 Am. St. 659-669 (unconscionable contracts).

Cited, §§ 13, 52, 62, 90, 102, 104, 105, 108, 109, 140, Hughes' Conts.; p. 40, Hughes' Proc.

Chesterfield case stated: Janssen was a money lender and S. was a spendthrift rake aged 38, the grandson of the Duchess of Marlborough, aged 78. S. promised J. £10,000 cash if he survived the duchess, otherwise nothing. She died first, and S. gave a bond for £10,000 and paid a part of it. Then he died, and his executrix filed a bill to cancel the bond because it was usurious and unconscionable. But having afterward given the bond, and so ratified (*Omnia ratihabitio*, etc.), this was

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decisive, and upon this the case was decided.

Chesterfield v. Janssen bounds and defines actual fraud, arising from *suggestio falsi* or *suppressio veri.* Snell, Eq. 449; *Caveat emptor:* Jenkins v. Long, *sub* Pasley Case; Fitzsimmons v. Joslin. *Constructive fraud* arises as in Keech v. Sandford; Huguenin; C. v. J. Secret agreements in fraud of marriage. Strathmore. The rationale of C. v. J. was applied in Sasportas (duress).

Contracts in restraint of marriage. Maddox. Fraud affecting third persons. Twyne's Case; Sexton v. Wheaton; Grover v. Wakeman, Am. Dec.; Massey v. Gorton, Am. Dec.

Catching bargains; consideration. Dealings with heirs and weak and unsound intellects. Chesterfield. *See* Keech; Huguenin; 1 Add. Conts. 103; Garcelon's Estate (1894), 104 Cal. 570, 32 L. R. A. 595-605, ext. n. (guardian dealing with ward); Hall v. Perkins (1829), 3 Wend. 626, Huff. & W. Conts. 311.

Dealings in confidential relations. Bigel. Fraud, 190-287. Fraud and misrepresentation. 1 Beach, Eq. Prac. 64-113; Pasley.

A slight consideration will support a heavy obligation. Chesterfield; Thornborow: 331; 1 Beach, Eq. 143; Horne v. Higgins (catching bargains).

Huguenin v. Baseley (1807), 14 Ves. Jr. (Eng.) 273, 2 Lead. Eq. Cas. 1156-1290, n., 33 Eng. Reprint, 526, 6 Rul. Cas. 834-912, n. (rescission of contracts); 9 R. R. 276; 1 Beach, Eq. 114-147, Beach, Pars., Ans., Page, Conts.; Keener, Sel. Conts. 807, n.; Sto. Ag. 210, Cool. Torts, 621, Bigel. Fr. 55, 192, 230, 286, Bisph. Eq. 230, 231, 237, 1 Sto. Eq., 2 Pom. Eq.; 3 *id.* 1133, 3 Gr. Ev. 253, Perry, Trusts.

Cited, §§ 13, 52, 58, 62, 104, 106, 158, Hughes' Proc.; Hughes' Conts., p. 40.

Huguenin v. Baseley stated: B., a preacher, gained the confidence of Mrs. H., and by this induced her to place all her business in his hands, and then to make a voluntary settlement upon him. Then she married, and brought suit to set aside the conveyance. She succeeded upon the ground of undue influence and abused confidence.

This case is closely allied to Keech. Dimes; *In re* Hess's Will (1892), 48 Minn. 504, 31 Am. St. 665-691, ext. n. (wills, undue influence in making of); Richmond's Appeal, 59 Conn. 226, 21 Am. St. 85-104, ext. n. (presumptions of undue influence).

Frauds upon creditors. Sexton; Grover; Twyne's Case; Massey. *Frauds upon marital rights.* Strathmore. *Frauds upon powers.* Aleyn; W. & T. L. Eq. Cas.

Voluntary settlements: undue influence; catching bargains. Huguenin; Chesterfield; Ewing v. Wilson (1892), 132 Ind. 223, 19 L. R. A. 767, n. (voluntary trusts).

Tyrrell v. Bank of London (a fiduciary cannot speculate in his trust); Keech; 1 Beach, Eq. 114-147; Adams, Eq. 184. *See* ATTORNEYS. *Deeds. Avoidance of, for weakness of mind. Sub* Molton: 413.

Duress, etc. Allore v. Jewell (1876), 94 U. S. 506; Molton; Harding, 11 Wheat. 103; Ashmead, 134 Ind. 139, 39 Am. St. 239, n.: cases; Eastis, 95 Ala. 486, 36 Am. St. 227, n.

Fraud; inadequacy of price, when ground for

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rescission. 107 Tenn. 572, 89 Am. St. 957 (a liberal rule stated).
Mental superiority of promisee is no ground for rescission. Whart. Conts. 159. Fiduciary relations are closely scrutinized; influence when established is presumed to continue. *See* BURDEN OF PROOF. Burden is on one claiming a voluntary donation. Whart. 164; Ewing v. Wilson (1892), 132 Ind. 234, *citing* Huguenin. Party's representative may contest. Whart. 167. Such contracts may be ratified. *Id.* 168. Necessity of heir expectant may conduce to unfair dealing. *Id.* 169. Extortionate contracts for interest, if permitted by statute, are more open to revision. *Id.* 170. Relief is granted without regard to time. *Id.* 169. Gross inadequacy of price may lead to inference of fraud. *Id.* 165.
Duress avoids contracts. Sasportas; Ans. Conts. 164; City Nat. Bank v. Kusworm.
Undue influence. Huguenin; Ans.; Bish. 731-744; Hughes' Conts.; 1 Beach, Eq. 114-147; 87 Ala. 685, 4 L. R. A. 637, n.
Illegal contract induced by undue influence will be relieved against. 77 Mich. 598, 18 Am. St. 421, n., 6 L. R. A. 496; 85 Ky. 160, 7 Am. St. 583, n.; Bell, 123 Mo. 1, 45 Am. St. 505, n.: cases (*In pari delicto* considered); Diggle; Holman. L.C. 371, 363; 1 Page, Conts. 201-243.
Statute of frauds, deed; agreements. Oral agreement that grantee shall hold the property to prevent the grantor's improvidence is inadmissible. Horne: *Cited,* §§ 13, 68, 110, Hughes' Conts.; Goss: 55; Woollam: 53; Pym: 52.
Matter for grounds for relief must be charged in bill. Jackson v. Cleveland, 90 Am. Dec. 266, *post.* Perry, Trusts, 226; Sto. Pl. 10; *De non apparentibus,* etc. *It must be alleged and proved.* §§ 105, 110, Hughes' Conts.
Five hundred dollars is a sufficient consideration for $50,000. 1 Bouv. Dic. 1005 (inadequate price); *see* Bainbridge: 332.
Fraud is presumed from facts stated. Horn.
Repugnant pleading void. Horne; *Allegans,* etc. Alternative pleadings void. Pain: 107.
Observations upon the procedure in Horne. Facts showing a catching bargain, as that fifteen days after attaining majority an heir to $50,000 worth of realty conveyed it for $500 cash, the presumption of fraud arising from this is repelled by a direct averment that "there was neither fraud nor imposition in the transaction." "The pleader has stated himself out of court." "There may be merit in the case, but the bill does not show it." The decree is reversed with leave to amend as may be desired. Horne.
Conclusions of law are unavailing generally, is a general rule of pleadings. They are nullities and cannot be aided nor waived. Denial of them will not aid them. After stating the facts which showed fraud, these were not overcome by charging the above conclusions. Such a charge did not constitute an alternative nor a repugnant pleading. Particulars control universals. *Verba generalia.* Upon principle no new case would be presented, either by adding or striking out conclusions of law.
Amendments after a hearing by withdrawing allegations deliberately made of material facts are of questionable propriety. Walden. In *Horne* that would have

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been involved and also the denial and meeting by counter proof of the allegations in the original bill. If the complaint was insufficient, Higgins did not plead himself "out of court," for, strictly speaking, he never was in court before he described a *subject-matter* to which jurisdiction attached. Until this is done no complainant is in court, and no court has jurisdiction of the *subject-matter.* *See* CAUSE OF ACTION.
CHICAGO v. ROBBINS: *Sub* McManus.
CHICANE AND MALA FIDE CONduct: Prohibited. See *Bona fide;* Graver: 103. *See* also, SOVEREIGNTY; FRAUD; SHAM PLEADINGS; MORALITY. To be excluded. Robinson v. Raley: 45.
False allegations will not support a judgment. L.C. 102, 103.
CHILDREN: *See* INFANTS. Negligent; injuries to; liability. Lynch; Indemaur; McDermott.
CHISHOLM v. GEORGIA (1793), 2 Dall. 419; Boyd's Cas. 603; McClain, Cas. 713, 192 U. S. 329 (states, not individuals, may sue a state). Cohens states the rule.
States could be sued by any party in Federal courts before the adoption of the XI. Amendment to the Constitution of the U. S.
Sovereignty; when it may be sued. L.C. 259; 41 L. R. A. 33-73. Individuals cannot sue a state. 192 U. S. 331: cases. *See* SOVEREIGNTY.
CHITTY v. IRON MT. R. R. (1896), 148 Mo. 64-82. Variance, departure; *Allegata et probata* must correspond, relevancy of evidence depends on allegations. *Frustra probatur.* The cause of action stated limits the jurisdiction of the court. No other cause can be heard or considered. The theory of the case is denied, also in *Smith v. Burrus.*
Verba generalia restringuntur, etc. Particulars control universals. General allegations are limited by specific allegations preceding them. 148 Mo. 75; 71 Mo. 514; Dickson: 34.
Allegations essential. Chitty; Fish: 12*c*; Campbell v. Porter: 2; *De non apparentibus. See* ALLEGATIONS.
Allegations limit and control proof. Chitty; *see* MISSOURI; Bristow: 135; Perry v. Porter: 136*a*.
CHOSE IN ACTION: Bouv. Dic. Assignability of. *See* ASSIGNMENTS.
CHRISTIANITY: Is not a part of the common law. *See* DIVINE LAW; *Summa ratio,* etc.; Crepps: 113; Graver: 103; Bouv.; And. Dic.; MORALITY; DECEIT; *Jurisprudentia divinarum,* etc.; *Nec veniam,* etc.; *Nunquam res humanæ,* etc.; §§ 5, 5*a*, 13, 14, Hughes' Proc.
Construction imports morals. L.C. 214, 363; *Pacta,* etc.; *Pactione,* etc.; Holman; *Quæ verum naturæ,* etc.
Statutes not invalid if immoral and unchristian, in America. L.C. 253; Lewis, Suth. Stat. 85: cases; *cf.* §§ 5, 5*a*, 5*b*, Hughes' Proc.
The maxims of morality and the presumptions that import it throughout construction make Christianity a part of the law. What is implied is the same as if expressed. *Expressio eorum,* etc.; *Cujus est instituere.* No one is presumed a delict until alleged and proven so. *Actore,* etc. The morals of the people are presumed in multitudes of cases and maxims. Fraud and crime are presumed against. *Nulla impossibilia,* etc. §§ 5, 5*b*, Hughes' Proc.

Christianity.—

Whether or not Christianity is a part of the law of the land is a subject of much contention. In England it is generally conceded to be, while in America it is generally denied. *See* Church v. U. S. From a practical standpoint the disquisitions are idle, for those subject-matters affected by morals are construed alike. The principles in *Jus publicum privatorum*, etc., *Pacta conventa*, etc., *Privatis pactionibus*, etc., *Privatorum conventio*, etc., and *Nulla pactione*, etc., are applied exactly alike in both English and American cases. L.C. 363, 368. In the latter case the usefulness, destiny and perpetuity of government are placed upon the necessity of recognizing the same standards of morals discoverable in the English cases, where nominally Christianity is recognized in plain terms, *e. g.*, in *Summa ratio*, etc., *Lex est sancta sanctio*, etc.

In America it is claimed that Art. VI, Const. U. S., defines the supreme law of the land, and that this definition is an enumeration of exclusion. Expressio unius. Therefore Christianity is excluded, and is not to be considered fundamental law in construction. Otherwise we might interpret or construe it as a part of the law agreeably to *In præsentia majoris.* Now, whatever be the distinctions of initial starts and foundation cornerstones, the outcome is identically the same; for the cases show it, and in the face of these no one can claim that the necessary and indispensable morals imported by construction into compacts are different from the Christianity comprehended by jurists in England. Things equal to the same thing are equal to each other. Where the effects are the same, the causes must be the same. *See* DIVINE LAW; *Jurisprudentia est divinarum*, etc.; §§ 5-5*b*, Hughes' Proc.

In the above is a striking illustration of the force of *Cujus est instituere ejus est abrogare*, the truth of which is also obscured in America by misleading verbiage and unjustified declarations as to barriers around the judicial department. *Nil facit error*, etc.; *Non differunt*, etc.; *Error nominis*, etc.; *Præsentia corporis*, etc. *See* SUBJECT MATTER.

In Christian countries, the presumptions for mercy, morality, innocence and legality are the same, but these great Christian strands in jurisprudence are of Christian thought and origin. *Jurare*, etc. (oath). They were a part of the "New Dispensation" preached by Paul and vainly preached in Asia and Africa. §§ 5, 13, 14, Hughes' Proc. To illustrate, we have mentioned contracts and evidence, and much greater deductions can be drawn from the origin and development of equity jurisprudence. In this are found the highest demands for good faith, the clean hand and the clear conscience. Its high and inexorable demands are discoverable in such cases as *Collins* and *Keech.* § 5, Hughes' Proc.

Morality is a ground of law. §§ 1, 52, Gr. & Rud.

CHRISTMAS v. OLIVER (1820), 5 M. & R. (Eng.) 202, 10 B. & C. 181 (21 E. C. L. R.), Sm. L. C., 3 Gray, Cas. Prop. 739, 1 Rul. Cas. 480, n.; 120 Mo. 498, 23 L. R. A. 561-571, ext. n.; 41 Am. St. 711, n.; Carver v. Jackson (1830), 4 Pet. (U. S.) 1-101: *cited*, Herm. Estop., 2 Gr. Ev., 2 Whart. Ev., New. Eject. *Cited*, § 108, Hughes' Proc.; § 174, Gr. & Rud.

Estoppel by deed. 3 Dev. Deeds, 1273-1317; Young v. Raincock; Galland, 26 Cal. 79, 85 Am. Dec. 173; Horton, 8 Ala. 73, 42 Am. Dec. 628, ext. n.; 4 Kent, 460.

Accepting a deed estops the grantee, for estoppels are mutual. Kingston's Case: 2 Smith, Lead. Cas. 790-793, 818-858, ext. n., 8th ed., 3 *id.* 2104-2110, 9th ed.; Young v. Raincock. Also, a lessee who accepts a lease for six oil wells, when there are in fact only five. He is estopped and cannot sue for damages. Clifton, 40 W. Va. 207, 52 Am. St. 872.

A tenant cannot dispute the landlord's title. Willison, 3 Sm. L. C. 2110, 9th ed.; 11 Rul. Cas. 73.

Recitals in a deed bind the grantee and those who claim under him. Orthwein v. Thomas (1889), 127 Ill. 554, 11 Am. St. 159, n.; 4 L. R. A. 434; Carver: *stated*, 2 Herm. Estop. 609; Douglas v. Scott (1831), 5 Ohio 197: *stated*, 3 Wash. R. P. 102; 2 Dev. 992-1009; Jackson v. Cleveland, 3 Wash. R. P. 69-122; 4 Kent 441-499; 11 Rul. Cas. 48-73, cas. n. (excellent *resume*); 2 Best, Ev. 542; Gibson v. Lyon (1885), 115 U. S. 439: *stated*, 3 Sm. Lead. Cas. 2106, 9th ed.; Rigg v. Cook, 4 Gilm. (Ill.) 336, 46 Am. Dec. 452; Gilliam v. Bird (1848), 8 Ire. Law (N. C.) 280, 49 Am. Dec. 379-389, ext. n. (privies); Stow v. Wyse (1828), 7 Conn. 214, 18 Am. Dec. 90; 3 Sm. Lead. Cas. 2103, 9th ed.

Recitals in a deed bind a grantee by his acceptance. Smith v. Young (1896), 160 Ill. 163, 174.

In futuro interests conveyed by deed are void. Hawes v. Stebbins (1874), 49 Cal. 369. Deed of freehold to commence *in futuro* is void at common law. Notes, 55 Am. Dec. 414.

Deed of grantor not in possession, effect of. Tyler, Eject. 935-947; 4 Kent 446-449.

Grantee must be in esse and capable of taking. Morgan v. Hazlehurst (1876), 53 Miss. 665.

Subsequently-acquired title will feed the estoppel under some deeds. Partridge v. Patten (1851), 33 Me. 483, 54 Am. Dec. 633, ext. n.

A subsequently-acquired title feeds the estoppel. Ford Case, *supra*, 2 Herm. Estop. 640-700; Blanchard v. Ellis (1854), 1 Gray 195, 61 Am. Dec. 417, n.; 3 Wash. R. P. 109; Partridge (warranty deed); Frink, 14 Ill. 304, 58 Am. Dec. 575-589; McClusker v. McEvey (1870), 9 R. I. 528, 11 Am. Rep. 295; Bank of Utica, 3 Barb. Ch. 528, 49 Am. Dec. 189.

CHRISTY v. BARNHART (1850), 14 Pa. St. 260, 53 Am. Dec. 538-547, ext. n. *Cited*, § 290, Hughes' Proc.

Equitable exceptions to statute of frauds; strict pleading and proof. Lester: 341.

CHURCH: *See* Bouv. Dic. Member of not liable for its debts. Allen v. Church (1905), 127 Ia. 96, 109 Am. St. 366, 69 L. R. A. 255-260: cases. *See* Hill v. Boston.

CHURCH OF THE HOLY TRINITY v. U. S. (1892), 143 U. S. 457-472, *stated* 70 L. R. A. 456, 932. *Cited*, §§ 52, 267, 268, Gr. & Rud.

Church stated: A statute forbade the importation of contract labor, *i. e.*, it was

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made penal for a foreigner to contract to do work and labor and to remove to the United States therefor. The language of this statute was broad and sweeping, and made no exceptions. A church employed a minister in England to come to the United States and preach, which he accordingly did. For this the church was prosecuted and fined. It sought a review of the sentence by writ of error, and thereon the case was reversed. It was held that hiring a minister to preach was not within the meaning and intent of the statute.

Statutes are construed to exclude absurdities. Verba intentione. S. *ex rel.* Henson v. Sheppard; Osgood v. R. R.; Burks: 217*a*; 5 L. R. A. 341-343; U. S. v. Fahrenholt (1907), 206 U. S. 226, *citing* Lieber, 56.

Religion—Christianity—is a part of the law of the land. Summa ratio, etc.; Trist: 214; Riggs: cases; Burton v. U. S., 64 Cent. L. J. 247-254; S. v. School District, 76 Wis. 177.

Fundamental law annexes itself by implication. C. v. Hess: 215; Riggs; Trist: 214; S. v. Sheppard, *supra*; Andrews; Haddock; *Audi alteram partem.* 5 L. R. A. 341-343; Kirven v. Va. Car. Co. (one may estop himself from setting up a statute in defense); Indianapolis: 223; Oakley v. Aspinwall; Riggs v. Palmer.

Constitutions as well as statutes are to be construed in the light of previous history and surrounding circumstances. S. v. Kelly; Haddock v. Haddock. *Contemporanea expositio,* etc.
The logical or liberal constructionist occupies the same ground as he who contends for an unwritten constitution.

CIRCUITUS EST EVITANDUS: Circuity is to be avoided. Bouv. Dic. *See* MULTIPLICITY OF SUITS. § 138, Hughes' Proc.

CIRCUMSTANTIAL EVIDENCE: S. v. Hudson (1903), 66 S. C. 394, 97 Am. St. 768-802, ext. n.; Hickory: 194; 3 Gr. Ev. 33, 34, McClain C. L. 408-410 (homicide). Homicide may be proved by. S. v. Gillis, 73 S. C. 95, 114 Am. St. 95. *Res ipsa loquitur; Probatis extremis præsumuntur media.* Gillett, Indirect and Collat. Ev. 51-97; 12 Cyc. 379-496; 21 *id.* 374-1021, §§ 272, 274, Gr. & Rud. *Omnia præsumuntur contra spoliatorem.*

Court should instruct as to. 43 Tex. Crim. 442, 69 L. R. A. 193-217, ext. n.

CITATIO EST DE JURI NATURALI: A summons is by natural right. Cases *In Banco Regis,* Will. VIII. *See* SUMMONS. Power to hear and decide gives power to summon and to compel attendance of witnesses. Such powers are inherent and cannot be destroyed or clogged by statute. L.C. 223, 224. *Cui jurisdictio,* etc.; *Cujus est juris principale.* § 28, Hughes' Proc.

CITATIONES NON CONCEDANTUR, priusquam exprimatur super qua re fieri debet citatio: Citations should not be granted before it is stated about what matter the citation is to be made. A pleading should be sufficient. *De non apparentibus,* etc. L.C. 232. *See* CAUSE OF ACTION.

CITIZENSHIP; DOMICILE; ALIENS; Expatriation. Principles of. U. S. v. Wong Kim Ark, *sub* Cohens; Guier v. O'Daniel (1806), 1 Bin. (Pa.) 349, 1 Am. Lead. Cas. 877-907, n.; Viles v. Waltham (1893), 157 Mass. 542, 34 Am. St. 311, n.; And. Dic. 183, 7 Cyc. 143-148.

Citizenship.—
Jurisdictional in United States courts, and can not be waived; must be averred with certainty. L.C. 10; Morris v. Gilmer (1889), 129 U. S. 129-131; Robertson v. Cease (1878), 97 U. S. 646 (may appear anywhere in the record, and, it seems, in the statutory record).
Jurisdiction of corporations in United States courts. Barrow Steamship, 170 U. S. 100: cases (strict rules relating to); Blake v. McClung. Residence synonymous with. Robertson v. Cease.

CITIZENS' ST. RY. v. STOCKDELL: L.C. 186.

CITY NATIONAL BANK v. KUSWORM (1894), 88 Wis. 188, 43 Am. St. 880, 26 L. R. A. 48-68, ext. n.; 1 Page, Conts. 259, 266, 267. *Cited,* § 184, Hughes' Proc.

Duress. One cannot employ criminal process for civil purpose. Kusworm Case, *supra*; Watkins; Sasportas; Collins (compounding offenses); *Nullus commodum capere.*

CIVIL ACTION: Defined; Bliss, Code, Pl. 1. *See* CAUSE OF ACTION.

CIVIL DAMAGE LAWS: Gage v. Harvey, 66 Ark. 68, 43 L. R. A. 143, n.; Davis, 31 Ohio 359, 27 Am. Rep. 514-520; 3 Sedgk. Dam. 1246-1266; Cool. Torts 282-324 (statutes of states), 4 Encyc. Pl. & Pr. 542-551; 2 Kinkead 481-487; Bouv.; And. Dic. (DAMAGES).
Liability for remote damages under. 1 Suth. Dam. 6-38; Scott v. Shepherd: cases.

Joint and several liability. Suth. Dam. 14.

CIVIL DEATH: Civil death was the consequence of a capital sentence at common law. It did not divest the convict of his lands, as a general rule. Civil death attended every attainder of treason or felony at common law. The attainted became disqualified from being a witness, bringing an action, and from performing any legal function. Avery v. Everett (1888), 110 N. Y. 317, 6 Am. St. 368-383, ext. n., 1 L. R. A. 264; Kenyon, 18 R. I. 590, 26 L. R. A. 232, n.; Davis v. Laning (1892), 85 Tex. 39, 18 L. R. A. 82, n., Ans. Conts. 117. *See* CONVICT.

Attainder; doctrines of. Garland, 4 Wall. 333, 6 Am. Law Reg. (N. S.) 284, 394, n., 1 Kent 409, Cool. Const. Lim. 316-321; Boyd v. Mills (1894), 53 Kan. 594, 42 Am. St. 306, 25 L. R. A. 436.

CIVIL LAW: Its influence on procedure. Dash: 237*a*. *See* CODES. § 350, Hughes' Proc. §§ 4, 20, 77, 118, 134, 145, Gr. & Rud.

Equity is largely founded on. See EQUITY.

Maxim of, borrowed. *See* MAXIMS; EQUITY, Hughes' Proc. 1 Kent 516-548; Howe's Civil Law; Scrutton's Roman and English Law. § 16, Gr. & Rud.; 1 Spence's Eq. 1-87.

Regula pro lege, si deficit lex. §§ 118, 145, 150, Gr. & Rud.

Is the mold or cast of modern law. §§ 145, 211, 212, 258, Gr. & Rud.

Citations to Regula pro lege, etc., *will disclose its importance.*

Statute of frauds from. § 288, Gr. & Rud.
Federal power developed on. Genesee Chief; § 81, Gr. & Rud.
Supreme law of the land construed by. §§ 79, 81, Gr. & Rud.
Is fundamental. §§ 76-81, 118, 145-150, Gr. & Rud.
Renaissance of. §§ 72-81, Gr. & Rud.

CIVIL LIBERTY: Depends on right to sue, and protection from courts. Mar-

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bury. *See* Cool. Torts, 7 Cyc. 160-178; Tiede. Pol. Power; *see* GOVERNMENT.

CIVIL RIGHTS: Cool. Torts; And. Dic., *sub* Statutes; Tiede. Pol. Power; Bouv. Dic.

Civil rights guaranteed. §§ 1977-1981, R. S. U. S. Purpose of. Tuchman v. Welch (1890), 42 F. R. 548; Strauder. Applies to state courts. Tuchman Case.

Removal of cause for denial of. § 641, R. S. U. S.; Strauder. *See* REMOVAL OF CAUSES. Declare equal and uniform law. §§ 1977-1981, R. S. U. S. Equity will protect by injunction. Note 10 L. R. A. 617.

Fundamental rights; protection of. §§ 20-22, 27, 28, Hughes' Conts.

Conspiracy against. See CONSPIRACY; MALICIOUS ACTS.

Civil rights. Slaughter House Cases; Strauder; Hurtado; Civil Rights Cases (1883), 109 U. S. 3, 27 L. ed. 836; Boyd, Cas. 518; Cool. Torts; 89 Md. 565, 73 Am. St. 201, n., And. Dic. 823-832 (prohibition of intoxicating liquors): cases. The federal government and the states. Tarble's Case.

Jurisdiction of the federal courts. Chisholm; Martin v. Hunter's Lessee; Cohens; U. S. v. Texas (1892), 143 U. S. 621; Boyd, Cas. 637; Logan v. U. S. (1892), 144 U. S. 263; Thayer, Cas. 343. Civil rights and their guarantees. McClain, Const. Cas. 879-963. Uniform laws, guaranty of. Blake v. McClung. *See* CONSTITUTIONAL LAW. *Cited,* And. Am. Law.

The Fourteenth and Fifteenth Amendments apply to state action, and not to that of individuals. James: 233.

CLARK v. DES MOINES (1865), 19 Ia. 199, 87 Am. Dec. 423-441, n., 6 Am. Law Reg. (N. S.) 146; Brown, Jurisdic. *Cited,* § 43, Hughes' Conts. *Cited,* §§ 302, 303, Gr. & Rud.

One dealing with a public agent is presumed to know the "scope of his authority." Bloom; Beard; Sturdivant; Beach, Pub. Corp. 200; Sto. Ag. 306, 1 Danl. Nego. Insts. 445, Tiede. Com. Paper 137, Mech. Pub. Off. 821.

Public agent failing to bind his principal does not bind himself. McCurdy v. Rogers (1866), 21 Wis. 197, 91 Am. Dec. 468, n. Lakeman v. Mountstephen (also Mountstephen v. Lakeman, 1874), L. R. 7 Q. B. 202, 7 Ho. Lds. 17, 9 Moak, Eng. Rep., 5-16, n., 6 Rul. Cas. 285-325, n., 1 Beach, Conts. 508; Ans. Conts. 60; 3 Pars. 23, 25; Chit., Bish., Add., 2 Whart. Ev. 879, 880; Browne, Stat. Frauds.

A public agent only binds himself when it is clearly proved that such was the intent; the presumption is against it. Brown v. Rundlett (1844), 15 N. H. 360: cases; 1 Dill. Munic. Corp. 238, n.; Macbeath v. Haldeband (1786), 1 Term (D. & E.) 172; Hodgson v. Dexter (1802), 1 Cranch 109: *cited,* 1 Dill. Munic. Corp. 238, n.; Mech. Ag. 559; Sto. Ag. 302-307, 320-322; 1 Add. Conts. 38; L.C. 60; Knox Co., *sub* Hill v. Boston.

Caveat emptor applies in dealing with all agents. See *Caveat emptor.* And all officers; and that jurisdiction attached and continued. Windsor; Campbell; Horan; § 7, Hughes' Proc.

The mandatory record is, so to speak, a power of attorney, and must authorize all official action founded thereon. §§ 6-12, Hughes' Proc. *See* CONSTITUTIONALISM; Batty.

CLARK v. HOLMES: *Sub* M'Manus.

CLARK v. McDADE (1897), 155 U. S. 168.

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The mandatory record—due process of law record—must disclose a federal question. See Furman. That is its function and to it is applied *Expressio unius.*

CLARKE v. MAY: *Sub* L.C. 114.

CLARK'S EXECUTORS v. VAN RIEMSDYK (1815), 9 Cranch 153.

Denials must be certain. L.C. 34.

CLARK v. SIBES: L.C. 2*b*.

CLAYTON v. BLAKEY (1799), 8 T. R. (D. & E.) 3; 2 Sm. L. C. 108-117; 1 Chit. Conts. 447; 2 Add. Conts. 686; Tay. Land. & Ten. 55, 79; Wood, Land. & Ten. 15, 23, 25; Browne, Stat. Fr. 38; 2 Wh. Ev. 855; 2 Gr. Ev. 329; 8 Rul. Cas. 651. *Cited,* §§ 143*a*, 145, Hughes' Conts.

Statute of frauds; Leases; Tenancies from year to year; effect of leases void under sections 1 and 2 of Statute of Frauds. C. v. B.; S. P., Rigge v. Bell.

Holding over, when held to be from year to year. 1 Wash. R. P. 601; Wood, Land. & Ten. 15; Tay. Land. & Ten. 58. *Lease for more than a year.* Talamo v. Spitzmiller (1890), 120 N. Y. 37, 17 Am. St. 607, n., 8 L. R. A. 221, n.; Coudert v. Cohn (1890), 118 N. Y. 309, 16 Am. St. 761, n.; Hand v. Osgood (1895), 107 Mich. 55, 30 L. R. A. 379; Martin v. Smith (1874), L. R. 9 Ex. 50, 43 L. J. Ex. 42, 30 L. T. 268, 22 W. R. 336, 8 Rul. Cas. 646, n.

Oral lease for more than a year. Specific performance. Lester: 341.

Lease to begin in futuro. Young v. Dake (1851), 5 Seld. 463, 55 Am. Dec. 356-360, n., 17 Am. St. 753, Bish. Conts., 1 Dev. Deeds, 48, 2 Whart. Ev. 854, 883; Whiting v. Ohlert (1884), 52 Mich. 462, 50 Am. Rep. 265. *Contra.* Jellett, 43 Minn. 166, 7 L. R. A. 671, n.

Renewal of leases from period to period is permissible. Wood, Land. & Ten., § 416; Ranlett v. Cook, 45 N. H. 512, 4 Kent 109, Tay. Land. & Ten. 332-339; Furnival v. Crewe, 3 Atk. 33, 9 Mod. 446, Platt, Leases, 711, 712; 1 Tay. L. & T. 332-345; 2 *id.* 445; Woodfall, L. & T. 365; Baynham v. Guy's Hospital (1796), 3 Vesey 295: *stated,* 1 Platt, Leases, 712; 1 Woodfall, L. & T. 366; Insurance Co. v. Bank (1899), 71 Md. 58 (*Res ipsa loquitur*); Moller v. Gates; *Allegans,* etc.

Lease for three years renewable at option of lessee, who agrees to deliver possession at the end of term, is renewed for a like term by his continuing in possession without further notice. Delashman v. Berry (1870), 20 Mich. 292, 4 Am. Rep. 392-395: *stated,* Wood, Land. & Ten. 416; *Expressio eorum,* etc.; Holly v. Young (1876), 66 Me. 520; Levitski v. Canning (1867), 33 Cal. 299; Clarge v. Merrill (1871), 51 N. H. 415; Kramer v. Cook (1856), 7 Gray 550; Despard v. Walbridge (1857), 15 N. Y. 374. *Continuity is presumed.* Carotti v. S.; 1 Gr. Ev. 41, 42.

Lease for one year with privilege of several is presumed to be on the same terms, conditions and with the same rights and privileges to the tenant as during the first year. Brown v. Parsons (1870), 77 Mich. 24: *stated,* 11 Am. Law Reg. (N. S.), 595, 6 Wood, Land. & Ten. 416; 3 Colo. 287; McKinney v. Peck (1862), 28 Ill. 174.

Holding over, is presumed to be upon the same terms. Continuity is presumed. Carotti, 4 Kent 109; Blumenberg v. Myres (1867), 32 Cal. 93, 91 Am. Dec. 560, ext. n. Courts favor a holding from year to year, when no different intention is ex-

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pressed. Wood, Land. & Ten. 15; Bartow v. Cox (1847), 11 Q. B. 122 (Adol. & El., N. S.); Tay. Land. & Ten. 58; Lesley v. Randolph (1833), 4 Rawle (Pa.), 123. *Intention is sought, and this, if manifest, controls; this is enforced for any duration.* Furnival v. Crewe, *supra.*
Renewal covenants must be for a certain period, and must be certain as to terms. Abeel v. Radcliff (1816), 13 Johns. (N. Y.) 297, 7 Am. Dec. 377-381, n.; Clinan v. Cooke, 1 Sch. & Lef. (Ir.) 22: *stated,* 7 Am. Dec. 380; Rutgers v. Hunter (1822), 6 Johns. Ch. (N. Y.) 215; *cited and discussed* in Kollock v. Scribner; Wood, Land. & Ten. 689, 673; Tay. Land. & Ten. 322, 325, 4 Kent 109, n., 91 Am. Dec. 565; Cunningham v. Pattee (1868), 99 Mass. 248; *stated,* Wood, Land. & Ten. 416. But court will make certain if possible. Horner v. Leeds. Perpetuities are disfavored. *Sub* Converse v. *id.,* note 91 Am. Dec. 565; Tay. Land. & Ten. 333, 334; Rutgers v. Hunter, *supra;* Gr. Pub. Pol. 604; Morrison v. Rossignol (1855), 5 Cal. 64, Wood, Land. & Ten. 416; *Re* Lawrence's Estate (1891), 136 Pa. 354, 11 L. R. A. 85, n., 4 L. R. A. 141, n.; rule against perpetuities, Gray (1886); Walkerly, *in re* (1895), 108 Cal. 627, 49 Am. St. 97-138, ext. n.
Collateral covenants. Those not essential to the lease are not renewable. Rutgers, *supra.*
Acceptance of rent after notice to quit renews tenancy upon former terms. Goodright v. Cordwent (1795), 6 T. R. (D. & E.) 219, 1 Wash. R. P. 638, Wood, Land. & Ten. 48; Ins. Co. v. Bank, *supra.*
A lease may be made for any duration, for one or one thousand years, if not a perpetuity. But if lease is made for a longer period than the statute of frauds allows, then the writing is essential, unless it is an equitable exception to the statute. Lester: 341. The construction of leases at will, or for a short period, favors a tenancy from year to year at least, if there are any equivocal dealings. It is in favor of augmentation that leases from year to year are so prominent in the books. Richardson v. Langridge, 4 Taunt. 128, Lead. Cas. Conv. 4. And also in favor of the tenant if the lease is void under the statute of frauds. C. v. B.
A leasehold estate is personal property. § 144, Hughes' Conts. *See* LEASE.
Rigge (Doe d. Rigge) v. Bell (1793), 5 Term Rep. 471 (Durn. & East), 2 Sm. L. C. 105-108; 2 R. R. 642, 15 Rul. Cas. 596, n.; 1 Chit. Conts. 447, 451, 484.
Statute of frauds; leases. Leases for more than three years. Effect of lease void under §§ 1 and 2 of Statute of Frauds. R. v. B.; Clayton. An oral lease void under the Statute of Frauds is good from year to year. 1 Chit. 451. A contract may be void in part and valid in part. Mallan.
CLEM v. MESEROLE: L.C. 2*c.*
CLERICAL ERROR. Bouv. Dic.
CLEVES v. WILLOUGHBY: L.C. 383.
CLOUD ON TITLE: Miller v. Cook (1890), 135 Ill. 190, 10 L. R. A. 292-302 ext. n.; Helden v. Hollen (1895), 80 Md. 616, 45 Am. St. 371-378, ext. n., 3 Pom. Eq. 1396; And. Dic.; Scott v. Onderdonk (1856), 14 N. Y. 9, 67 Am. Dec. 107, n., 2 Beach. Eq. 556-565, 1 High, Injunc. 524-529.
Specific delivery of chattels. Pusey: 276; Somerset v. Cookson (1736), 1 W. & T. L. C. Eq. 1110-1117, 22 Eng. Reprint 140.
CLYDE MATTOX CASE: L.C. 153.
CLYDESDALE BANK v. PATTON: L.C.8
CODES: Inspirations of older systems. § 141, Gr. & Rud.
A system of unification, simplification and expedition. §§ 134, 146, 170, 275 *Id.*
One juridical document, one statement, one forum and one relief. §§ 40, 275 *Id.*
Reaffirm maxims. § 18, *id.; see* MAXIMS; §§ 40-43, 118, 134, 140, 160 *id.*
Support the supreme law of the land. §§ 83, 134-170, 147 *Id.*
Also the conserving policies. §§ 84-123, 134, 140-170, 207, 225 *Id.*
Discussed in relation to the conserving policies and fundamental principles. §§ 134-170, 202, 225, 227 *Id.*
Destroyed by construction. §§ 147, 195, 233, 297 *Id.*
Codes are strict certain systems. §§ 118, 142, 160-162, 163-164, 202, 207, 227, 233, 239-256, 244, 278 *Id.*
Provide for demurrer. §§ 160, 162, 163, 238 *Id.*
Also motion in arrest. §§ 162, 238 *Id.*
Also collateral attack. §§ 160, 162, 202, 227, 238 *Id.*
Also the mandatory record. §§ 160, 162, 202, 207, 225-227, 233, 238 *Id.*
Codes: Prefatory observations of a general character. Codes of civil procedure and practice acts exist in most of the states. New York adopted a code in 1848; that as a model has been followed in all states except the New England, New Jersey, Delaware, Pennsylvania, the Virginias, Michigan and Illinois. Connecticut borrowed the English Judicature Act. Massachusetts, Michigan and Illinois are practice act states. In these Chitty's Pleadings and imitations thereof are the leading guides. This fact will indicate the condition in Illinois. Several decisions are found countenancing the view that essential pleadings can be waived; very large and undefined views exist as to the limitations of stipulations and waiver. Loose notions are abroad that under stipulations essential pleadings may be dispensed with. From three hundred and fifty reports it is difficult to determine whether or not a plea of *res adjudicata* must be pleaded. Some of the decisions do not contemplate that the very purpose of this defence is to determine at the right time and in the right way if an issue already tried and disposed of is to be again tried, also that this is the logic, sense and essential use of the defence for purposes of protection. Indeed, it seems that in actions on the case the defence may be offered under the *general issue.*[1] From Blackstone, Chitty and Illinois decisions great anomalies and in-

1—Chicago v. Babcock (1892), 143 Ill. 143; *Ubi eadem ratio.*

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congruities are established and maintained. Fundamental maxims and Mansfield's decisions are rarely discussed and applied as the maxims most happily were in *Langabier v. R. R.*

The admiralty, the federal, the appellate requirements of the federal high court and the Illinois courts imperatively require the application of fundamental principles for harmony, which is sadly lacking, while causes for discord are constantly augmenting. Add to this view the adjacent code states, Indiana, Kentucky, Missouri, Iowa and Wisconsin. Therefrom are cast deepening shadows over American statesmanship and juristic ability. In Wisconsin and Kentucky code administration seems beneficent. In these, fundamental principles are uniformly quoted, explained and applied. In these, essential pleadings cannot be waived; they must exist and discharge their functions. At the trial they are to limit issues and narrow proofs for certainty, expedition, economy and limit the application of judicatory power. In other words, pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it, and to add necessary links in the mandatory record to resist objections upon collateral attack, which is only a belated general demurrer or motion in arrest of judgment, which attaches to the first substantial fault with fatal effect to him who caused it. Consequently a response pleading need not be more respectable than the initial.[2] Those who are not juridically proper and correct cannot shift their dereliction upon a respondent in the latter states; nor do they tolerate conclusions of law, the *general issue*, equivocal pleadings or denials.[3] Repeating, pleadings are to limit issues and narrow proofs *inter alia.*

Allegata et probata must correspond, is not taught and upheld in one case and denied in the other by tolerating departures or variances.[4] In

2—*Quod ab initio non valet tractu temporis non convalescet*; Shutte v. Thompson: L.C. 291.

3—Dickson v. Cole: 34; *Verba fortius accipiuntur contra proferentem;* Dovaston: 217.

4—Bristow v. Wright (Mansfield); S. P. Wabash R. R. v. Friedman (Ill.): 135-137; Citizens' R. R.: 186; Borkenhagen: 81.

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the last states, *Frustra probatur quod probatum non relevat* (it is vain and fruitless to prove what is not alleged);[5] and *Expressio unius est exclusio alterius* (the express mention and description of one thing exclude all others) are strictly applied. In these states one must allege and describe under the rule, that every presumption is against the pleader from the standpoint of public policy, of the conserving principles of procedure, not from what has been stipulated or waived or consented away by an adversary or the responding pleader. It is not he, but public policy, that requires the rule that every presumption is against a pleader, yesterday, today, tomorrow and forever, equally, uniformly, consistently without variableness or shadow of turning, exactly as Mansfield,[6] Kent,[7] Story,[8] and Waite[9] applied and upheld it. From the civil law, the law of Rome, of all continental powers of Europe, of England, Ireland, Scotland and most of America the inexorable rule is, what is not juridically presented cannot be judicially considered. In other words, for all countries the rule is a Roman maxim, the condensed good sense of nations which was adopted by Bacon and expressed thus: *Verba fortius accipiuntur contra proferentem* (every presumption is against a pleader or composer). It is also found in this language: *De non apparentibus et non existentibus eadem est ratio* (a fact not made juridically to appear is presumed not to exist). It is well to perceive and ever remember that it is the mystic influence of these rules that involves *Caveat emptor* in contract law, and the necessary practice of producing the entire record in cases where estoppel of record or title to property, real or personal, is to be established.[10] This is the rule in all jurisdictions. Even in Illinois where the presumption of regularity is indulged in to the greatest extent,[11] still the entire mandatory rec-

5—*Quod ab initio non valet*, etc.

6—Rushton: 5; R. v. Wheatley: 19.

7—Bartlett v. Crozier: 6.

8—Garland v. Davis: 60.

9—U. S. v. Cruikshank: 232; Hanford v. Davies: 86.

10—Clem v. Meserole; Campbell v. Greer (Mo.).

11—Harrow v. Grogan (1906). *See* ILLINOIS.

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ord is required to attend the judgment entry when it is offered to prove estoppel[12] or title to property. To be consistent the presumption of regularity should supply omitted juridical matter, whether allegations, or record, or any other part of pleadings, or of the mandatory record. The Illinois cases may be cited to support this proposition, that a proceeding may be *coram judice* in one relation, *e. g.*, to resist objections upon collateral attack, but *coram non judice* in other relations, *e. g.*, in tests of a proceeding to determine its validity upon tests of *res adjudicata*. This must be so wherever courts will presume the regularity of proceedings to uphold them, but will not indulge in such presumptions to uphold all proceedings. In relation to pleading *res adjudicata* reference was made to the incongruous views of the court.

Courts that are inconsistent as to estoppel of record and requirements to resist objections upon collateral attack are unstable and inconsistent as to hundreds of rules, and particularly all those above mentioned. They do not rightly comprehend the depth, the simplicity and the importance of procedure.

For clearness, simplicity and the best impressment it may be well to designate a constitutional, a mystic and a *coram judice* rule in this relation, and therefore it may be stated:

I. *What ought to be of record must be proved by record and by the right record is an indispensable rule in the operations of a constitutionalism.*[13] *It is a conserving policy.*[14]

II. *Every presumption is against a pleader.*[15] *This may be called the mystic rule.*

III. *A court is bound by its record. This may be called the coram judice rule.*

These three rules are indispensable in a constitutionalism. They lie at the base of its operations. They pervade all of procedure, evidence, pleading and practice. Every system that is definite and certain must recognize them.

12—Wright v. Griffey.
13—Planing: 2*d.*
14—Hughes' Proc., p. 14; § 104, Gr. & Rud.
15—*Verba fortius accipiuntur contra proferentem;* Dovaston: 217; U. S. v. Cruikshank: 232; *De non apparentibus,* etc.

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The foregoing maxims and rules lie at the base of code procedure and of all practice acts. All are construed to harmonize therewith.[16] Legislatures cannot abrogate either the constitutional or the mystic or the *coram judice* rule. But it is due to confess that decisions denying them can be found in all of the jurisdictions above mentioned except Wisconsin and Kentucky and possibly the admiralty.

Looking from Massachusetts, New York and Pennsylvania the views are not more encouraging. Such are the views from the four greatest and most influential states. In judging the code from New York there is much to discourage as to its utility and worth. In many cases it has been construed to impugn fundamental principles, some leading ones of which are above mentioned. But this fact is equally true in Illinois. It is not true in Wisconsin, Kentucky or Texas. Consequently it may be said that codes are not responsible for that deplorable uncertainty that is so patent in several states. The interlacing and adjacent jurisdictions of Illinois for obvious reasons dread its singular and erratic doctrine, which in a state adopting a code would be laid to it. Accordingly, Blackstone, Chitty, Stephen and Gould have not illumined the subject of procedure any more than have Bliss, Pomeroy and Van Santvoord. *Atlantic R. R. v. Benedict Pineapple Co.* (Fla.).

Only those who properly explicate at least a few fundamental principles, and such as are above named, have well instructed in procedure. Of those principles the constitutional, the mystic and the *coram judice* rules are chiefest. A right definition of pleading and a right comprehension of those rules for the existence, maintenance and operation of the conserving principles of procedure are no doubt the best introduction to the great and most important subject. Works that do not introduce and explain those principles and rules are inherently defective. Indeed, they often appear vicious. The prevalence of works omitting those indispensable

16—*Concordare legis legibus est optimus interpretandi modus.*

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matters may largely account for the dreadful disorders already mentioned, which arise in any jurisdiction wherein fundamental principles are disregarded. Such are disregarded and undermined where the conserving principles and their means are not comprehended and vindicated. See 8 Columbia Law Rev. 172-182.

The code is not uniformly construed to maintain the conserving principles. Every gradation of view obtains as to the power of legislatures to interfere with the due administration of the laws. This brings into view the two schools of construction, the strict and the liberal.[17] The same clause may present matters one of which will be strictly construed while the other will be liberally. For instance, "the statement shall contain facts sufficient to constitute a cause of action in ordinary and concise language without unnecessary repetition." Now, the requirement of facts sufficient is mandatory, it is jurisdictional, but the other provisions are directory or formal. Omission of the former involves the general demurrer, the motion in arrest of judgment, and finally and forever collateral attack. But the other matters are formal requirements and if not objected to fully, precisely and promptly they are waived.[18] Dispensing with the first is a grave attack upon the mandatory record for which liberal construction will be given; it will be vindicated and maintained.[19]

But there are courts that countenance legislative power to abrogate or abolish the mandatory record. Some do and some do not, some will and some will not and the result is a Babel of confusion, as the latest cases show.[20]

If a statute may dispense with one material allegation then it may another, or all.[21] Consequently all of the rules and maxims already introduced may be abolished, and if so they carry with them all of the conserving principles of procedure. Now, may a statute abolish the due process of law record? It is easy to see this cannot be done in a constitutionalism.

17—§§ 186, 187, 204, Hughes' Proc.
18—Kraner v. Halsey: 299.
19—Indianapolis: 223; *Lex non exacte.*
20—Los Angeles v. Davis (corporate existence presumed) *contra* cases. *See* Indiana; Missouri.
21—Huntsman v. S.: 231.

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Codes, the English Judicature Act and all practice acts must be made to harmonize with fundamental principles, and when they are they are all very much alike. The aim of all is at unification, simplification and expedition. They are most nearly allied with equity procedure. Indeed the English Judicature Act provides that wherever it is found deficient then construction shall import from equity practice. This is analogous to the oath of judicial officers in Germany, which provides that where the law of the empire is deficient then the defect shall be supplied from the civil law.[22]

There is ample warrant for saying the American profession quite generally believe that criminal procedure is more strict and better safeguarded than is civil.[23] But looking from the requirements of the conserving principles[24] that view is untenable. From necessity all procedure must be strict, and in conformity to the constitutional, the mystic and the *coram judice* rules already introduced. These apply to all systems that are definite and certain. This fact should be clearly perceived and well comprehended.

The final tests of all proceedings are the same upon *res adjudicata* and collateral attack. And here all are strictly judged.

Codes are only affirmative statutes of older principles; the old rules are reaffirmed in a new language. The old gold is only recoined and newly stamped. Its functions and properties are not changed.[25] But as with all new statutes great confusion has resulted. The decisions show these have been construed without any regard whatever to fundamental requirements. Reference has been made to the two schools of constructionists, the strict[26] and the liberal.[27] Constructionists who have not contemplated the conserving principles of procedure, a part of which are the rules above men-

22—*Regula pro lege, si deficit lex.*
23—1 Gr. Ev. 65.
24—Hughes' Proc., pp. 7-14.
25—Bliss Pl. 141; Kewaunee County v. Decker: 29.
26—*Ita lex scripta est;* Los Angeles R. R. v. Davis.
27—*Lex non exacte;* Kollock v. Scribner; End. Stat. 182.

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tioned, have wrenched and distorted the jurisprudence of their states. This is indicated from the masses of conflicting cases relating to the denial.[28] As it is with the denial so it is as to conclusions of law and waiver which superficial but attractive errorists have glossed and christened by the euphemism, the *theory of the case.* This has been carried to the extent of making the *statutory record* (bill of exceptions) a substitute for the mandatory record. The decisions of several states support this view and possibly Illinois in some of its later decisions. This of itself will unsettle a jurisprudence.[29]

Contract has its old universal cases, *e. g., Cutter v. Powell:* 308, *Cumber v. Wane:* 311, *Lampleigh v. Brathwait:* 301, *Chandelor v. Lopus:* 374, and *Pasley v. Freeman:* 375 and many others. Likewise tort, such as *Scott v. Shepherd* (Squib Case), *Fletcher v. Rylands;* and likewise crime, *R. v. Wheatley:* 19, *McNaghten's Case:* 195, *Levett's Case,* etc. These cases are cited, taught and made prominent in all the best written works. But it is otherwise with procedure and especially the codes. For them there are no universal, widely cited and well established cases. They not only omit such cases but they disparage them. They do not cite *Dovaston v. Payne:* 217, *Rushton v. Aspinall:* 5 and *Bristow v. Wright:* 135, the last two by Mansfield and all in Smith's Leading Cases. Now the fact is, there are no better code cases than these, but code authorities do not cite and teach them, nor the great basic maxims above mentioned. On the contrary they lead away from them or else mystify them. Pomeroy can be cited either to uphold or exclude them. Code works are pervaded with an atmosphere of mystery, or novelty, or something new, progressive and revolutionary. It is time to state plainly and to teach that the only change is the escape from Blackstone's feudal and middle age law and a return to the Roman.

Instead of recognizing these facts the instructive and ever enduring maxims and the cases illustrating

28—Dickson: 34; Seattle Bk. v. Jones: 36, 48 L. R. A. 177-210, ext. n.
29—Planing Mill Co. v. Chicago: 2*d*

Codes.—

their application are not only excluded but are treated as obsolete or unworthy. The condensed good sense of nations is excluded from codes, code writing and code teaching.

Testing the condition from *res adjudicata* viewpoints there arise the discussions of the *Kingston Case,* the most widely cited case, it is said, in England and America. After discussions of it throughout four generations the student should know upon what *res adjudicata* depends and how to plead it. As to this Chitty, Stephen, Gould, Pomeroy and Bliss have failed, for many supreme courts do not even know that the subject depends upon the mandatory record.

From the decisions it can be gathered:

1. *That the defence may arise from the matter of the statutory record, or even forensic conduct, which may be gathered, set up and acted on by any means.*
2. *That the record need not be pleaded.*
3. *That the defence is admissible without pleading it, in which case the court is at liberty to disregard it.*
4. *That if the record is pleaded and proved then the court is bound by it.*[30] *A court is bound by its record.*
5. *That in equity and under codes it is waived unless pleaded, if an opportunity was presented to plead it.*
6. *That incomprehensible views are entertained by some courts.*[31]

Now, bearing in mind that estoppel law pervades all branches and profoundly affects the stability of law, an estimate may be made of disorders issuing from one source alone. The situation is not merely janus-faced, for it is more, it is a hydra, and each head has several faces, and tongues speaking all things to all men. Such are the establishments courts have given where they exclude the constitutional, the mystic and the *coram judice* rules already defined. Such conditions were not designed nor contemplated by framers of codes. These were designed for a beneficence and not an affliction.

A leading purpose of a code is one juridical document, one statement, one forum and one relief adminis-

30—Kingston's Case: 76.
31—Breeze; Rensberger (Colo.).

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tered according to the fundamental principles already introduced.

Codes are opposed to the common counts, conclusions of law, the general issue, sham and equivocal denials, variances and departures.[32] To say they favor the three leading rules already mentioned is to give them the greatest stability and respectability. The generalities, prolixities, redundancies and absurdities of older systems are inimical to codes; these always respect the theory that pleadings are to limit issues and narrow proofs, also serving the purposes of appellate procedure, *res adjudicata*, due process of law, removal of causes and forfending against objections upon collateral attack, among other things.

The authorities referred to have not defined pleadings so as to impress well all of their uses. Had they, fewer courts would have decided that pleadings can be waived.

Codes contemplate a mandatory record, its functions and operation exactly as do other systems. It is the foundation of a judgment. It is the authority for the judgment, and must be produced therewith as a part of the record in all cases to prove either estoppel or title to property.[33] Upon this record depend all the conserving principles of procedure. Codes minutely provide for it, beginning with the requirement for the complaint or statement already mentioned. Defects of substance and omissions of material matter therefrom cannot be waived, as will appear from another most important provision which is, that filing the answer waives all defects except that the complaint does not state facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the subject-matter.

For defects of description of the subject-matter and jurisdiction thereof it is thus provided that further objection may be raised, and consequently the ground of the general demurrer cannot be waived. Ever afterward it searches the substantial pleadings and attaches to the first fault found therein, not the second or still further. Such objection may be renewed or first raised upon

32—Hanford v. Davies: 86.

33—Clem v. Meserole: 2c; 1 Whart. Ev. 824.

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motion in arrest, or renewed or first raised upon collateral attack.

For a court to proceed when those defects exist is usurpation or abuse of power, which is incurable by waiver;[34] waiver cannot dispense with the clerk nor his record nor the functions of these. By waiver or consent a court of record cannot be made a justice's court. The clerk must participate and make the record that binds the court. The division of state power is involved; the clerk is a constitutional officer.

In all these proceedings the three leading rules, the constitutional, the mystic and the *coram judice*, are ever considered, are always present and operative. The maxims and old cases illustrating the applications of these are as much the law of procedure as they are of equity, contract, tort and crime. Codes are founded on fundamental principles, and of such are those maxims, rules and cases. But these basic and important facts are not made plain in code and other late procedure works. Indeed they are denied in many states.[35] In some it is held that omission of material facts is of no consequence; of course this is tantamount to saying that pleadings can be waived. More hold that answers and replies can be waived. Of course if one substantial step or part can be waived then so can another. Where waiver of substantial matter is recognized, there courts are not bound by their records. Nor are the rules—Every presumption is against a pleader, What ought to be of record must be proved by record, The general demurrer searches the record and attaches to the first fault—of fundamental concern.

The denial of these rules subverts the due administration of the laws, or very important parts of the supreme law of the land, for reasons already indicated. When this is perceived then some of the most important viewpoints of procedure and of government will be gained, after which progress is more rapid and far easier.

The law of waiver is the same under codes and other systems. The maxim,

34—*See* CAUSE OF ACTION; ALLEGATIONS.

35—Schubach v. McDonald (1903 Mo.); *see* CAUSE OF ACTION; Los Angeles v. Davis (Cal. 1905); Hume v. Robinson (Colo.): cases.

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Consensus tollit errorem (acquiescence in error will obviate its effect) equally applies throughout all of procedure and its systems.

What is mandatory and what is directory is most important in construction; another expression is this, what is essential and what is waivable, or matter of substance and exception matter. No hard and fast rule relating to these matters can be laid down. Possibly deductions from these observations may serve quite a useful purpose: Whatever is essential to appear in the mandatory record to resist objections upon collateral attack is mandatory or imperative or essential; or whatever is essential in proving *res adjudicata* is likewise an essential which cannot be waived.

Relating to all these basic matters the code is identically like all other systems. Codes introduce no new fundamental changes where rightly understood and interpreted.

Procedure should be discussed from fundamental principles like equity and other leading subjects. What would discussions of these other subjects amount to if they were not so discussed is a question that is left to the reader. Great branches of the law have their maxims and great cases as already noted, and this is particularly true of procedure; its basic maxims and cases are those of codes, judicature acts and practice acts. The fundamentals of equity procedure are common to all systems. Section Ten, Story's Equity Pleading, is equally applicable to all. Mansfield applied it in *Rushton v. Aspinall;* Kent in *Bartlett v. Crozier;* Story in *Garland v. Davis;* Waite in *U. S. v. Cruikshank.* In these cases varied aspects of the constitutional, the mystic and the *coram judice* rules instructively appear. Consequently it appears that those rules are basic, are truly fundamental and common to all systems. Much may be deduced from a fundamental maxim; it is the grain of mustard in the parable; it often appears as the acorn from which springs the mighty oak—the root and heartwood of the tree. As it is with the acorn so it is with the maxim, *De non apparentibus et non existentibus eadem est ratio,* already introduced. It is a cognate of What ought to be of record must

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be proved by record and by the right record, which is the *constitutional rule,* also of What is not *juridically* presented cannot be *judicially* considered. Here also are rules that are clear and positive and they mean what they say, still they are constantly disregarded, and so as to leave the subject of procedure as contract would be if on one hand the assent thereto was required and on the other it was not. But fundamental requirements of contract, tort and crime are not required or rejected in alternation as are the fundamental requirements of procedure. From this situation and condition the bright, ambitious young minds of this generation are allowed to grope their way for light. When they ask for the pointers and fixed stars they are directed to the *ignis fatuus* that leads only into the morass. The intelligence of the reader and the experience of the student are appealed to for justification of the above observations. They are asked to look and to judge and to say what is the value of great works on procedure that wholly omit fundamental ideas and the impressing of them. Those familiar with Justinian's edict to gather and burn writings and to punish authors that made no reference to fundamentals may see in it great wisdom. It is an old saying that history repeats itself. Those who would be rightly instructed in the law of procedure may well wish for a return of Justinian's sovereign ægis. Past experience shows that the effort to write or teach procedure separated and away from its fundamentals, its old and its great cases, and the operations of a constitutionalism is not only jejune and futile but is ruinous to the student, demoralizing to the administration of justice and consequently is paving the way for the passing of the usefulness of the lawyer who submissively yields to the behests of ignorance and the demands of arbitrariness. And such ought to go and never return to break their oaths again. He who does not know the fundamental conceptions is not fully qualified to discharge the functions of a lawyer to society, its courts and its government. He has only to invite attention to his income.

The foregoing propositions should

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be well considered by those who have been taught that procedure is a local and provincial subject. Indeed, the view invited from Illinois shows it is tribal, also that there are warring sects in the same tribe. If jurisprudence can suffer from hostile and warring systems of procedure then it needs no argument to show what has happened and is progressing. The dissensus is made quite plain and pronounced in the American Bar Association Reports. The twenty-fifth is especially instructive. From these it is seen that prominent teachers and universities are as distinctly tribal as are the states. Notwithstanding, some venture most questionable assurances of great progress in writing and teaching the law, but expressly excepting *fundamental* law.

Where Illinois and New York have been taken for the "pointers" by the younger states, in some cases, if possible, they have out-Heroded Herod. In them jurisprudence swings both ways with more frequency and alternating regularity than in the guiding states. Whereever consistency and stability are sought there is much in New York that must be discarded. Of all the older states its decisions have the least regard for fundamental principles and for *stare decisis*. It does not seem probable that *Bartlett v. Crozier* (Kent) would readily be recognized as an excellent code authority in that state. Rejecting that case as such is not the fault of the code, but instead reveals a defect in legal education. This defect is greatly remedied by a right explication of the foregoing basic rules.

Construction emasculates codes. The constructionist who is unfamiliar with the constitutional rule, its relations to the supreme law of the land and the very important parts thereof—the conserving principles—may generally be classed with the strict constructionist already mentioned. Not knowing the relation of procedure to government, he is unable to perceive the havoc he spreads. He is not schooled in those most important maxims, namely, *In præsentia majoris cessat potentia minoris* (in the presence of the major the power of the minor ceases) and *Cujus est instituere ejus est abrogare* (he who can institute can also

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abrogate). He is unable to classify laws, and vindicate the greater; he is unable to see that a constitutionalism depends upon the three leading rules already defined; that the mystic rule is always upheld; that those three rules are parts of an unwritten constitution, for the reason that they support the integrities of such important parts of the supreme law of the land—the conserving policies of procedure. These propositions should be well comprehended.

Legislatures cannot prescribe for courts rules of construction. Courts that concede this permit undue encroachments by the legislature, and thus the division of state power is disregarded. Authorities conceding that variances and departures may be authorized by statute or by practice disregard the three basic rules, the first one of which, the constitutional rule, is the first rule of evidence; those who overlook this fact do not write perfected philosophies of the law of evidence nor of pleading. Authorities countenancing the admissibility of variances and departures misconceive the fundamental basic rules of procedure. Of course they deny that *Bristow v. Wright* (Mansfield), *Perry v. Porter* (Mass.), *Wabash R. R. v. Friedman* (Ill.) and *Section Ten*, Story's Equity Pleading (*Allegata et probata* must correspond), are excellent code authorities. They are unable to see that *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged) is a vital rule in all certain and definite systems. Those who disregard these rules in construction are enemies of codes; it is easy to see they do not know or have any respect for the maxims and old cases, and that they regard these as obsolete and repulsive.[36] They dodge or refer to these as well worn. It is untaught that they have worn well and were the acorns from which the roots and heartwood of the law in the year books sprang.[37]

From a right consideration of the three fundamental rules they will still appear as the roots and heartwood of the law, not less today than yesterday nor thousands of years ago. Those maxims of antiquity cost it great agitations and struggles of illustrious heroism. Rightly viewed

36—Pp. 26-27, Hughes' Proc.

37—Chitty v. R. R.; S. *ex rel.* Henson v. Sheppard.

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there comes nothing from the eternal past more sacred, more glorious and valuable than those acorns of our unwritten constitution. They are the "metwand" by which all our rights are safeguarded and protected. Written constitutions are made from them; they are remoulded and restamped—that is all. The meaning is the same. By them all constitutions are construed. Antiquity did nothing in vain. Theology without its commandments would be heartless and devitalized. A jurisprudence without its basic maxims is a drifting wreck; it is a jumble of absurdities and contradictions. A theologian who would discard the commandments, the parables and greatest of sermons because they were old and commonplace would stand as do prominent juridical authorities denouncing the maxims and old cases, either by silence or in express terms. It is done in both ways. From such a view it seems apropos to ask if it might not be well to consider the teachings of Bacon, Mansfield, Hamilton, Kent, Story, Broom and the late Judge Tuley of Chicago.[38] The latter said ninety-five per cent of the library was useless to him who knew the maxims.

A view of the code from the four great states will show what it has become. A view from Illinois at the eight intermixing and adjacent jurisdictions will suffice to show that those entrusted with jurisprudence are not consistent, if worthy, guardians. But successive generations will not work to erect a Babel. They soon tire and yield to reason and possible paths. The great maxims, the condensed good sense of nations, commandments of mercy, reason and protection will return to illumine and lead jurisprudence. The orgies of errorists are but a passing whirl. The flood of stuff rolled over a handicapped people by the mischievous arm of commercialism must yield to the writings by the finger of God.

Conserving principles are vindicated before the rights of parties are considered is a rule frequently disregarded. Wherever this rule is respected are found good code cases, whether in Massachusetts, New York, Pennsylvania or Illinois.

Courts are not bound by their record

38—Address, Illinois State Bar Association, 1903 (Chicago Legal News, 493-517).

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where they attempt to administer justice out of and independent of records, or the rules for the due administration of justice.[39] *At the base of these lie the three leading rules above defined.*

The three basic subjects are Evidence, Pleading and Practice Rules. They intermix with all parts of procedure, sometimes appearing as one part and sometimes as another. They involve the estoppels and these are a part of all subjects. They support many property rights. The interlacing of those rules presents much trouble to those who must place every rule in its right class before it can rightly be understood. These rules resist the attempted classification into substantive and adjective law.

Sham, false, general and uncertain pleadings are inimical to codes. Closely allied with some of the foregoing maxims are the requirements for certain, true and *bona fide* pleading. Pleadings are to present a real *bona fide* cause, not sham and false allegations, denials and issues.[40] The equity system is not more exact and precise as to these requirements than are codes. No system is more opposed to sham and false pleas. Generalities are reprehensible. Conclusions of law and general issues are disfavored. Pleadings are to limit issues and to narrow proofs. They should present the allegation, the admission or denial and the issue with that certainty essential for the integrity of the conserving policies of procedure. This is the best and most practical definition of certainty. This certainty is practically indispensable for the due administration of the laws, for which the judiciary will enlarge, limit or nullify statutes as the due administration of the law may require. The essential means of the judiciary cannot be denied or impaired by statute.[41]

These cases will illustrate the application therein of the foregoing fundamental principles. The constitutional rule, "What ought to be of record must be proved by record and by the right record": *Campbell v. Greer:2a*; *Borkenhagen v. Paschen:* 81; *Saunderson v. Herman* (Wis.); *Hoover v. King* (Ore., 65 L. R. A. 790). The mystic rule, Every presumption is against a pleader: *Amory Mfg. Co. v. Gulf R. R.* (Tex.); *Draper v. Medlock* (Ga.). A court is bound by its record: *Houston v. Williams:* 245; *McLaughlin v. Kelly:*

39—Planing: 2*d*; Austin R. R. v. Cluck.
40—*Fabula non judicium;* Wonderly v. Lafayette County: 102.
41—Indianapolis, etc. R. R. v. Horst.

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31. A record must be certain and specific and state a matter in order to confer jurisdiction. Facts not conclusions of law must be pleaded—rationale of codes: *Green v. Palmer:* 90; *Hanford v. Davies:* 86. Ambulatory pleadings are bad, they cannot be "fish, flesh or fowl": Rideout; *Kewaunee County v. Decker:* 29; *Draper v. Medlock* (Ga.); *Ruckman v. R. R.* (Ore.). Pleadings are to limit issues and narrow proofs, and for this courts will construe: *Kollock v. Scribner* (Wis.). Prolixity is to be avoided; the common counts are abolished; a cause need not be stated but once: *Sturges v. Burton* (O.): 111. Defenses not pleaded are waived: *Borkenhagen v. Paschen:* 81; *Field v. Mayor:* 84. *Probata,* however strong and convincing, cannot supply *allegata;* allegations must appear in the right record: *Thomas v. Mackey:* 15; *Borkenhagen v. Paschen.* Issues must appear, and in the right record: *Hubler v. Pullen* (Ind.). Denials must be certain and positive; every presumption is against a pleader: *Dickson v. Cole* (Wis.); *Seattle Bank v. Jones* (Wash., 48 L. R. A. 177-210); *Garland v. Davis:* 40. Denials upon information and belief must be certain and positive; they cannot be of matters within personal knowledge: *Humphreys v. McCall:* 38; *Avery v. Stewart* (N. C., 68 L. R. A. 776). *Allegata et probata* must correspond: *Eddy Co. v. Blackburn:* 136; *Citizens' R. R. v. Stockdell:* 186; see *Bristow v. Wright:* cases. False and sham pleadings are a culpable abuse of justice: *Lowry v. Moore:* 104; *Wonderly v. Lafayette County:* 102; *Munroe v. Callahan* (Neb., 70 Am. St. 366); see *Graver v. Faurot:* 103: cases. Dilatory or abatement pleas are strictly judged: *Kraner v. Halsey* (Cal.).

Codes are not perfect. Nihil simul inventum est et perfectum is as applicable to them as other systems.[42] They must be aided by construction: *Kollock v. Scribner; Indianapolis,* etc., *R. R. v. Horst. Concordare leges legibus est optimus interpretandi modus; Benedicta est expositio quando res redimitur a destructione.*

Fundamental principles are interpreted into codes. Their provisions and requirements involve much that relates to constitutional law, as hundreds of discussions show. They are construed from requirements of the conserving principles, among which are requirements for appellate procedure, to resist objections upon collateral attack, for *res adjudicata,* due process of law, the division of state power, removal of causes, the comity of courts, for justification defences, election of remedies, for public policy, constructive notice and other jurisdictional interests.[43] For these all statutory provisions are construed for reason, morals, convenience, protection and other considerations. When so construed all codes, practice acts and statutes of regulation in substance become identical.

42—See title page, Chitty's Pleadings; Sto. Eq. Pl. 25.

43—Hughes' Proc., pp. 1-14.

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These various matters are not separate and apart from the three basic rules. On the contrary they are all interwoven and interlaced. They are complex and closely related. The law is an entirety, and so construction must harmonize and apply it.

Codes, practice acts and statutes are construed to further and advance the due administration of the laws. For this language is expanded or contracted as the exigencies of fundamental requirements demand. For this construction is a silent factor and imports or excludes.[44]

The practitioner under a code must know the conserving policies, the rules of construction and must employ these for the end in view.[45]

Codes prescribe rules of construction, as next quoted:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. If, upon the trial of any action, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed on motion and showing cause therefor, and on such terms as the court may prescribe, to amend his pleadings to conform to the proofs."

"The provisions of this act shall be liberally construed and shall not be limited by any rules of strict construction. The rules of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its object and assist the parties in obtaining justice."

Barron v. Baltimore, it may be added, is a limitation to the first eleven amendments to the Constitution of the United States. It bears the rule, that the states are not bound unless they are named to be bound. As those amendments must be construed so must be the above rules of construction. The conserving principles are limitations upon all these rules. Those principles are first looked after and placed above the view to substantial justice between the parties.[46]

The above rules are limited by many rules of fundamental law

44—C. v. Hess: 215; S. v. Townley: 225*a*; Campbell v. Greer: 2*a*.

45—McCulloch v. Maryland: 147; Church v. U. S.; Indianapolis: 223.

46—Austin R. R. v. Cluck; Planing: 2*d*.

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which have been overlooked by many courts. Under them they have condoned variances and departures incompatible with requirements of pleading and the three basic rules. Requirements of *res adjudicata* and of the record to resist objections upon collateral attack and of the conserving policies of procedure have been ignored. Records have been abrogated and swept away in several states. In several the statutory record is substituted for the mandatory; this of itself will not only unsettle but it will demoralize any system.[47]

The above quotations from codes have been used as a shield from which destructive attacks have been made upon the three basic rules, which will allow of no impairment or qualification. They will suffer no exceptions or diminution. They are parts of the prescriptive constitution. They lie at the base of the due administration of the laws. Their requirements are an irreducible minimum. They prevail against statutes.[48] Repeating, they are chief; they have no equals or affinities that impair or detract. For their indispensable operation and necessitous functions intelligent construction bends and molds, in obedience to the maxim, *In præsentia majoris cessat potentia minoris.*

The reader should carefully investigate the foregoing propositions. It is believed they are above all deserving. They involve the acorns, the roots and heartwood of all systems of procedure. If this be true the grounds of the foregoing conclusions should be thoroughly mastered. Then the reader can judge whether or not procedure is local or provincial as is contended for by prominent writers and teachers, also, whether or not the study of procedure is a study of government.[49]

The Municipal Court of Chicago has provided for it a code wherein the statement of the cause is called a bill of particulars. The construction of this enactment will afford many instructive illustrations of the need of fundamental instruction.

Codes spring from the same cornerstones as other systems, and those

47—*Ubi jus incertum ibi jus nullum; Lex est misera ibi jus est vagum.*
48—64 Cent. L. J. 129-134; 169-174.
49—U. S. v. Cruikshank: 232; Blake v. McClung.

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foundations are the three basic rules. It is often and correctly said that codes grow out of the older systems. "The Roman still holds dominion over this world by the silent empire of his law." It is also quite true to say that the code is a system conceived from three basic rules to be construed and harmonized with fundamental requirements of government, its supreme law and its parts, the conserving principles of procedure. A sufficient comprehension of older systems is gained when it is perceived that they all rest on the three basic rules. To learn these acorns, a forest of leaves, twigs and underbrush should be avoided. They may be gained by other means. They may be gathered from requirements of appellate procedure or to resist objections upon collateral attack, or of *res adjudicata* or from tests of due process of law,[50] or other conserving principles of procedure.

It is clearing to say codes are developed from conceptions of those conserving principles for directness, brevity and economy. It can be demonstrated that only intellects that clearly perceive the last proposition can either rightly judge or construe a code. Decisions that ignore these principles are only blocks for Babel.[51] He who will avoid this must turn from the morass and seek the chiseled way to be climbed. It is not downward but upward, giving a broadened and clearing view. This way is triangulated and reckoned from fixed stars, which shine on from age to age.[52]

CODINGTON v. MOTT (1862), 1 McCarter (N. J.), 430, 82 Am. Dec. 258, n. Amendments; limitations of the right. *See* AMENDMENTS.
COERCION: Of wife; when presumed. C. v. Neal; Bouv. Dic.; 106 Am. St. 725-727; S. v. Nargothon (1904), 26 R. I. 299, 106 Am. St. 715-728, n., stating Stratton's Case, 21 St. Tri., 1046-1223 (Mansfield); 4 Bl. Com. 30; R. v. Tyler; Crutchley; Dudley. § 294, Gr. & Rud.
COFFIN v. U. S. (1895), 156 U. S. 432; Innocence is presumed. *Actore*, etc.; Bonnell: 185; Howe's Civil Law, 125; 12 Cyc. 384. *Cited*, §§ 118, 271, Gr. & Rud.
COGGS v. BERNARD: L.C. 350.
COHABITATION: Promise for, an illegal consideration. Beaumont v. Reeve: 367; Ans. Conts. 187; § 92, Hughes' Conts.
COHENS v. VIRGINIA: L.C. 244.

50—*Audi alteram partem;* §§ 51-78, Hughes' Proc.
51—*Cujus est instituere ejus est abrogare.*
52—64 Cent. L. J. 129-134; 169-174. §§ 83-123, Gr. & Rud.; Hughes Proc.: CODES; Preface, DATUM POSTS.

COKE: Observations on. §§ 6, 12, 13, 38, Gr. & Rud. *See* BACON.
COLE SILVER MINING CO. v. VIRginia and Gold Hill Water Co. (1871), 1 Sawyer, 685-695, 7 Mor. Min. Rep. 516.
Necessary parties essential for jurisdiction. L.C. 93; 52 Fed. Rep. 371, 3 C. C. A. 129, 10 U. S. App. 339; Buchanan.
Denials on information and belief insufficient to dissolve an injunction in vacation. L.C. 37, 279.
COLE S. M. CO. v. VIR. SILVER M. CO. 1 Sawyer, 470, 7 Mor. Min. Rep. 503. Service of process essential for jurisdiction. *Audi.*
COLES v. TRECOTHIC: *Sub* L.C. 390.
COLLATERAL ATTACK: See *Debile fundamentum*, etc.; *De non*, etc.; DEMURRER; CONSTITUTIONALISM; §§ 152, 201-260, 263-264, Gr. & Rud.
Function and operation of. §§ 63, 89-90, 203, 201-260, 108, 128, 235-239, 313, Gr. & Rud. Perez: 2*e*.
In proving title. §§ 124-133, Gr. & Rud. Clem: 2*c*; Campbell v. Greer: 2*a*.
A conserving principle. §§ 89-90, 163, 187, 192, 203, 204, 235, 269, 276, Gr. & Rud.
Title to property involves consideration of. §§ 124*a*, 187, 203, Gr. & Rud.
What will support a title to property or an estoppel of record is a test of the *coram judice* proceeding, which depends on a sufficient mandatory record. Now one must consider the *coram judice* proceeding and the mandatory record and its requirements in order to understand collateral attack. The ensemble must be comprehended; the law is an entirety. §§ 220-225, 235, 238-256, Gr. & Rud.

COLLATERAL ATTACK: It is a conserving principle of procedure. It is classified as the second, appellate procedure being the first and *res adjudicata* the third, the division of state power, due process of law, constructive notice and the record or constitutional rule, "What ought to be of record must be proved by record and by the right record" being others.[1] These conserving principles must be understood, also upon what they depend; all of these should be connectedly considered.[2] They are a mesh of interactions.

Direct attack is by appeal, or to set aside or quash or vacate or enjoin. Collateral attack is an objection raised in a collateral proceeding wherein a record is offered to prove a fact. This suggests the importance of collateral attack from an evidence viewpoint.

An important rule of all systems leads the way which is expressed thus: the ground of the general demurrer searches the whole record (essential pleadings) and attaches to the first fault; or thus: the

1—Planing Mill: 2*d*; Clem: 2*c*.
2—Hughes' Proc., pp. 7-14; §§ 83-123, Gr. & Rud.

Collateral Attack.—

ground of the general demurrer is never waived.[3]

In this connection at this time these observations are justified.

Codes respect this rule and thus provide for the motion in arrest and collateral attack in this language:

"The complaint shall state facts sufficient to constitute a cause of action * * * Filing an answer waives all defects except that the complaint does not state facts sufficient to constitute a cause of action and that the court has not jurisdiction of the subject-matter." Also this: "All relief granted shall be within the facts stated."

Accordingly codes provide for the motion in arrest and collateral attack. A section copied from Lord Redesdale should be familiar to every practitioner.[4]

From the above it may be traced from the Roman. The author of the code wrote profoundly: "The Roman still holds dominion over this world by the silent empire of his law." The author of the code, like Grotius, intended that his code also should be construed from that system which gave it—the civil law of Rome. Its maxims herein cited are imperative.

The code is founded on old systems. He who knows it as a late and modern creation gropes in the dark.[5] Such believe that statutes can abolish the mystic rule, *Verba fortius accipiuntur contra proferentem* (every presumption is against a pleader); *Dovaston v. Payne:* 217. He does not perceive that a reversal of that fundamental maxim from the Roman and published by Bacon would be the most ready and insidious weapon of an absolutism—a mystic means of arbitrariness. Blindness as to that fact is ignorance of fundamentals, also of the simplicity of the necessities of government.[6]

The study of procedure is a study of government.[7] A government of protection ordains courts and for them a record to confine their operations and the exercise of their powers. Courts cannot transcend their jurisdiction nor dispense with the prescribed means of exercising it. Consequently the rule is, "consent will

3—Campbell v. Porter: 2; U. S. v. Cruikshank: 232; Rushton: 5.
4—Sto. Pl. 10; 240-256; *see* STORY, Text-Index.
5—Bliss, Code Pl. 141. *See* CODES.
6—U. S. v. Cruikshank: 232; DUE PROCESS OF LAW RECORD.
7—U. S. v. Cruikshank: 232; *Audi alteram partem.*

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not confer jurisdiction of subject-matter." Consent will not authorize a court to convene and sit at an improper time and place,[8] nor on a holiday,[9] nor to act upon a forbidden subject-matter,[10] nor in a forbidden way.[11] The means of a constitutionalism cannot be contracted away; in the face of this fact it is repeated for emphasis that consent will not confer jurisdiction of subject-matter.

The means of a constitutionalism are a record, also its mystic rule of construction. Dovaston v. Payne. These cannot be abolished or destroyed or emasculated by plausible sophistry and the din and clamor of commercialism.[12] There must be a record which must state, must describe and define. What is not juridically presented cannot be judicially considered. What is not presented is not heard. An uncertain thing is no thing. A fact not affirmatively shown in the right record is presumed not to exist.[13]

Collateral attack involves all the matters referred to. It is also interwoven with constructive notice, the monitor of which is that important rule of *Caveat emptor*. Here is involved contract law; also much that relates to the law of real estate, and especially who is a *bona fide* purchaser thereof; what is notice to him of substantial defects is a question affecting many contracts relating to property. Judicial records have much to do with titles to property. Proof of title calls for a record.[14] Its production is necessitous and therefore is not a vain and fruitless thing, for it may be inquired into; its validity, force and effect may be inquired into wherever it must be produced.[15]

Ignorantia legis neminem excusat (ignorance of law is no excuse) is constantly applied to him who is

8—*See* PLACITUM.

9—*Dies dominicus non est juridicus.*

10—U. S. v. Cruikshank: 232; Wonderly v. Lafayette County: 102.

11—Windsor: 1; Campbell v. Porter; Campbell v. Greer.

12—*See* LITERATURE; *Cujus est instituere ejus est abrogare* (he who can institute can also abrogate).

13—*De non apparentibus et non existentibus eadem est ratio.* Max. No. 2, §§ 78-85, Hughes' Proc., and citations of that maxim therein.

14—Clem: 2*c*; Windsor: 1.

15—Haddock v. Haddock; Pennoyer: 58; Windsor: 1.

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charged with *Caveat emptor* or constructive notice. These are the monitors of collateral attack. This maxim also, *Debile fundamentum fallit opus* (where the foundation fails all goes to the ground) is a leading idea in considerations of collateral attack.

Defects de hors the record must be raised by direct attack.

Collateral attack depends upon defects affirmatively appearing on the face of the record.[16]

Altered record if fair on its face is not subject to.[17]

Viewpoints of collateral attack are presented from the conserving principles of procedure. These could be expanded into volumes. Also from contract, tort, crime and construction, also evidence, pleading and practice; all of procedure is involved. What the mandatory record is for and what it must evince are ever in question. There have been mentioned the constitutional or record rule and the mystic rules; these are basic and important. Pleadings are viewed from this definition: "Pleadings are the juridical means by which a court is invested with jurisdiction of a subject-matter to adjudicate it." But there are involved only essential pleadings and not those presenting dilatory or abatement matter.[18]

Res adjudicata is closely related to collateral attack. Many of these rules are common; the inquiry after what was adjudicated and compliance with due process of law are the same in each case. Each depends wholly on the mandatory record. A record that will support a plea of *res adjudicata* will also resist an objection upon collateral attack and *vice versa*.[19] Decisions of all courts can be cited to support this proposition but all courts are neither consistent nor uniform.[20] Decisions show that gross incongruities disturb the symmetry and harmony of the law. Some decisions stand for strict rules for *res adjudicata* and different rules for collateral attack.

The certainty essential for one con-

16—Hall v. Henderson (1899), 126 Ala. 449, 85 Am. St. 53; *see* Turney v. Barr; Clem: 2*c*; HABEAS CORPUS.

17—Haven v. Owen (1899), 121 Mich. 51, 86 Am. St. 479-484, ext. n.

18—*See* ABATEMENT; WAIVER.

19—Slacum v. Pomery; Harrow v. Grogan; Turney v. Barr; Rensberger.

20—*See* RES ADJUDICATA; Harrow.

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serving principle is sufficient for another. The certainty required for due process of law, appellate procedure and *res adjudicata* is the same required upon collateral attack. The rationale is the same.[21] The certainty required for judicial purposes should be well and fully considered by the student.[22] From well presented views relating tc certainty he can consider the proposition that the study of procedure is the study of government.[23]

A broad explication of collateral attack presents the fundamentals not only of procedure but of government as well. From viewpoints thus afforded will appear the relations of so called adjective and substantive law, also that the law is an entirety; that a broad grasp of one principle includes the clue to many others. Accordingly the leading subjects of the law can be intensively presented. The vitals of the conserving principles may be perceived from collateral attack, also from the law of estoppel. These subjects are cognates.

Leading cases illustrating collateral attack: McAllister v. Kuhn: 3 (U. S. The ground of the general demurrer is never waived); *Windsor v. McVeigh:* 1 (U. S. Judicial abuse of power divests a court of jurisdiction and cancels the power to hear and decide); *Campbell v. Porter:* 2 (U. S. One may in effect demur to his own pleading); *Iverslie v. Spaulding:* 46 (Wis. Files or records must show sufficient matter); *Haupt v. Simington* (Mont. Collateral attack depends upon defects shown from the mandatory record. S. P. *Windsor v. McVeigh*); *Munday v. Vail:* 79 (N. J.); *Ransom v. Williams:* 122 (U. S. Omission of notice to sue out execution); *Douglas v. Whiting* (Ill. Omission of defendant's name from execution); *Horan v. Wahrenberger:* 85 (Tex. Judgments of highest court may ever be called in question); *Deputron v. Young:* 121 (U. S. Omission of necessary matter); *Rushton v. Aspinall:* 5; *Dovaston v. Payne:* 217; *R. v. Wheatley:* 19 (Eng. Omission of material allegations. S. P., *U. S. v. Cruikshank:* 232, U. S.); *Bartlett v. Crozier:* 6 (N. Y.); *Van Leuven v. Lyke:* 14 (N. Y.); *Slacum v. Pomery* (U. S.); *Crain v. U. S.; Williams v. Peyton:* 116 (U. S.); *Davenport v. Farrar:* 2*f* (Ill.); *Fish v. Cleland:* 12*c* (Ill.); *Israel v. Reynolds:* 83 (Ill.); *Moore v. C.:* 21 (Mass.); *Ricketson v. Richardson:* 59 (Cal.); *Pennoyer v. Neff:* 58 (U. S. Omission of matter in publication of notice); *Planing Mill Co. v. Chicago* (the right record must present essential matter); *Turney v. Barr* (Ia. Usurpation by a court no ground for. See *Windsor v. McVeigh*); *Campbell v. Greer:* 2*a*; *Roden v. Helm:* 12*b* (Mo.); *Benton*, S. P. *Williamson v. Berry.*

The maxims: Audi alteram partem; Quod ab initio non valet intractu temporis non convalescet; Frustra probatur quod probatum non relevat; Debile fundamentum fallit opus; Consensus tollit errorem. These maxims should be considered. *See* Hughes' Proc.

What is collateral attack. Claghorn's Estate (1897), 181 Pa. 66, 59 Am. St. 680, n.; Morrill v. Morrill (1887), 20 Or. 96, 23 Am. St. 95-119; Van Vleet, Collat. Attack; 1 Bailey Jurisdic. 165*a*-187. *See* JURISDICTION; CORAM JUDICE; DUE PROCESS OF LAW RECORD, Hughes' Proc.

The coram judice proceeding essentials must appear from the mandatory record. To evince this is the purpose and function of this record. Upon the *coram judice* proceeding and this record, *i. e.*, a proceeding from a lawful court properly evinced, depends the validity of title both to realty and personalty passing on judicial and execution sales. No other proceeding and no other record will support such titles. Wherever that record is offered to prove an estoppel or title to property it must pass the first rule of *res adjudicata*, namely, the proceedings must be *coram judice*, in other words, regular juridical proceedings. No other will meet the requirements or will pass objections upon collateral attack.

Coram non judice proceedings will not divest one of the lawful possession of title to his property, is a very important rule involving procedure and *Caveat emptor* as well. Purchasers under execution and judicial sales are charged with knowledge of all the mandatory record shows. They must take notice of nullities or void proceedings but not formal defects or mere irregularities. The former are void *ab initio*,[24] and of this the nullity is wholly judged by the mandatory record.

The coram non judice proceeding is pregnable to collateral attack. To this it is always vulnerable; time or laches will not cure it. Collateral attack is the last stage of the application of the rule that the general demurrer searches the whole record and attaches to the first substantial fault, likewise of the motion in arrest of judgment. This rule of the general demurrer, the motion in arrest of judgment and of collateral

21—*Ubi eadem ratio ibi idem jus.*

22—*See* CERTAINTY; CONSTRUCTION; CODES; Dovaston: 217.

23—U. S. v. Cruikshank: 232; Blake v. McClung; *see* CONSTITUTIONALISM.

24—*Quod ab initio non valet intractu temporis non convalescet.*

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attack is not waivable in character. It involves defects that cannot be waived. It involves grave jurisdictional defects that it is contrary to public policy to waive. The parties named upon the record cannot waive where they cannot contract or stipulate; they cannot dispense with the rule that a court is bound by its record; no court can lawfully proceed unrestrained. A court without a right record and bound thereby is without the pale of the law, and then its proceedings are *coram non judice;* such proceedings need neither objection nor exception in order to predicate objections thereto in appellate procedure or elsewhere.[25]

The coram non judice proceeding so appearing from the mandatory record is worthless for all purposes. It is a nullity, or a void thing. No title or right can be predicated thereon. It cannot be the basis of any substantive right. But it is otherwise with a merely voidable or erroneous judgment. Rights gained or founded thereon by a third person are substantive rights, and he is viewed as a *bona fide* purchaser, although the judgment is reversed on a direct attack, on appearance or proceedings in error. In the latter case, however, it is the judgment creditor alone who must account for all benefits and advantages derived from the *irregular* judgment. After its reversal he is liable upon an action for money had and received; he may be liable in many forms of remedy.

From the foregoing arise many aspects showing the intimacy of what are often called adjective law and substantive law, and which to many appear inseparable. If so, then there is no such distinction and therefore the "parol evidence rule" may properly be treated with both evidence and contract discussion.[26]

If property is sequestered and sold under a coram non judice proceeding no rights whatever are vested or pass thereunder. It now seems that the owner of property may defend it against all claiming under a *coram non judice* proceeding as he might against an ordinary trespasser. He may replevin it from an

25—Windsor: 1; Campbell v. Porter: 2.
26—1 Gr. Ev. 305, 16th ed.; 2 Page, Conts.

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officer, and anyway a stranger to the record whose property is taken for the debt of another may reclaim, retake and recapture it from all persons whomsoever.[27]

Regular process will protect an officer;[28] but regular process is not the defence of purchasers at official sales. The title and the defence of these must rest on the judgment and its foundations, in other words, the mandatory record.

In this connection it seems well to observe that the defence of an officer upon his process is tested by strict rules, as will appear from a consideration of *Freeman v. Howe* and *Buck v. Colbath.*

COLLATERAL FACTS: If inquired after, answers to, conclusive. 1 Gr. Ev. 423, 448, 449, 456, 459; 1 Wh. Ev. 339.

COLLECTOR v. DAY: L.C. 148.

COLLEGES: 7 Cyc. 284-298.

COLLEN v. WRIGHT: Sub MALICIOUS ACTS. *See* Polhill, *sub* L.C. 310; *Caveat emptor.* Agent assuming authority is liable.

COLLINS v. BLANTERN (1767), Wils. 341, 1 Smith, Lead. Cas. 715-755, ext. n., Gr. Pub. Pol. 113, 456; Ans., Pars., Beach, Keener, Chitty, Bish., Add., Clark, Hughes' Conts.; Bro. Max. 733, 2 Best, Ev. 545; 2 Kent, 467; 7 Encyc. Pl. & Prac. 253; Wh. Ag. 335; Rand., Danl., Pars., Com. Paper; 1 Gr. Ev. 284; 2 Whart. Ev. 931, 2 Benj. Sales, 788. *Cited,* § 92, Hughes' Conts. §§ 150, 154, 156, 158, Hughes' Proc.

Stated: Blantern executed a bond (deed—sealed instrument) obligating himself to pay C. £350 for advancements made by C. to suppress or stifle a criminal prosecution, to perpetrate a fraud upon justice, the due administration of the laws, which is illegal (Greenh. Pub. Pol. 441-446; Watkins v. S.). However, it was contended that, the instrument being a deed, this foreclosed all inquiry into the consideration; but this view was rejected, and it was held that such a bond was void, that against a deed the facts could be alleged and proved. *Ex dolo; Salus populi.*

S. P., Fink v. Smith (1895), 170 Pa. 124, 50 Am. St. 750, n. (contracts to compound a felony void); Brown v. Kinzey (1879), 81 N. C. 245, Huff. & W. Conts. 395; Mack v. Campeau, 69 Vt. 558, 60 Am. St. 948, n.; City Nat. Bank.

A seal imports a consideration. Jackson v. C.; Ans. Conts. 49. L.C. 311, 312.

Fraud; illegality is a defense to an action on a specialty. A deed is pregnable to a defense of fraud, accident or mistake. 1 Gr. Ev. 284; *Ex dolo; In pari;* Notes to Collins: Smith, L. C.; 7 Encyc. Pl. & Prac. 245-260.

Seals, technical effect of. Ellis; Rann; Jackson v. Cleveland; Ans. Conts. 49. *See* SEALS. *Compounding offenses.*

"He who hath done iniquity shall not have equity"; "One must stand before a court with clean hands." Collins.

27—Freeman v. Howe: 287: cases.
28—Savacool: 164; Buck v. Colbath.

Collins.—

In no age could one stipulate for iniquity. *Ex turpi contractu*, etc.; *Ex turpi causa*, etc.; *Ex causa turpi*, etc.

The great respect paid a seal for generations made the deed impregnable to attacks for fraud and illegality. The decision in Collins marked a great change of earlier views. After relaxation of old views as to the deed, there but remained the judicial record exempt from attacks for fraud. But these in turn were also greatly shaken by such decisions as *McElmoyle*: 56; *Haddock*. Now under very liberal rules, judgments are attacked. Needham: 261; Graver: 103. Such illustrations show the constantly growing influences and acceptance of the doctrines expressed in the great maxims of protection and morality.

COLLINS v. S. (1848), 14 Ala. 608. *Regular cohabitation is adultery—a crime.* A husband keeps a bawdy house if he permits his wife to cohabit with others. S. v. Young (1895), 96 Iowa, 262, 59 Am. St. 371.

COLORADO: At an early date in that state it was held that an order for filing a bill of exceptions in vacation might be waived. Since then the cases swarm with the doctrine of waiving the records and all that relate to them. *See* Hume v. Robinson: cases; Breeze; Rensberger; Russell; Hughes' Proc.

Matters not heard are nevertheless concluded: Rensberger. There are no dicta. Breeze; THEORY OF THE CASE; Deitsch v. Wiggins.

COLOR OF TITLE: *See* ADVERSE POSSESSION; GIFTS; Bouv. Dic.

COMITY OF COURTS: Freeman: 287: cases. Is one of the conserving principles of procedure.

COMMENCEMENT OF SUIT; WHAT is. Ald. Jud. Writs, 10; 2 Wood, Lim. 289-296.

Of action. Smith v. Hurd (1892), 24 Minn. 503, 36 Am. St. 661, n.; Ross v. Luther (1825), 4 Cow. 158, 15 Am. Dec. 341-347, n.; 1 Encyc. Pl. & Pr. 119-140; Ald. Jud. Writs, 1-10; Montague v. Stetts (1892), 37 S. C. 200, 34 Am. St. 736, n.; 1 Cyc. 739-757.

COMMERCE; INTERSTATE COMMERCE Act: Federal protection of, when within. Gibbons; Kidd v. Pearson (1888), 128 U. S. 1; And.; Bouv. Dic.; 7 Cyc. 412-493. Federal regulation of. Rahrer, *In re*. Original package case. Leisy; Bartemeyer; Rahrer.

COMMERCIAL PAPER: The rudiments of this subject are common to the law of contracts, except as to the distinctive features next mentioned:

1. *The liberal application of Ut res magis, etc., to uphold the instrument. Crooker v. Holmes; Angle Case, ante; Merchants' Bk.*

2. *The brevity of the contract and its aider by construction.*

3. *Its negotiable features. Swift v. Tyson; Miller v. Race; Young v. Grote; Lickbarrow v. Mason:* 394; and the liberal application of estoppel to uphold good faith and consistency. *Allegans contraria*, etc.; and

4. *The strict application of Expressio unius, etc., as to certainty of payer, payee, amount and time. Sturdivant v. Hull:* 410.

Certainty is essential for. Kelley v. Hemmingway: 304.

One signing and delivering it is presumed to "intend the natural, direct and probable consequences of his act." Swift. This is the rule in the "*Squib Case*." If signed and delivered, then ignorance, stupidity and breach of trust are no defense against the *bona fide* purchaser. Swift; Williams v. Stoll (Negligent execution and delivery of); Polhill v. Walter: 411; §§ 9, 11, 13, Hughes, Conts.

Important principles of a general and fundamental character are discoverable in the basic ideas of Commercial Paper, and among these are:

1. *Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer.* L.C. 394; Swift; Young; *Allegans contraria*, etc. Ewart on Estoppel.
2. *Where notice could be of no avail none is required.* Bickerdike: *Lex neminem cogit*, etc.
3. *One must state or define a ground of recovery or of defense in his pleading.* Rushton: 5.
4. *An assignee of the bill or note may gain a better right than his transferrer.* Swift; *Assignatus utitur*, etc.
5. *A defrauding transferrer may be made to account to a defrauded party.* Angle (a wrong-doer must account to a wronged party). The above five rules deserve careful consideration.

Commercial paper must be in writing. Ans. Conts. 53; also acceptance of. Ans. 53.

Consideration for, is presumed. Ans. 70; Rann: 312.

Construction of. L.C. 410; Crooker.

Nature of its negotiability. Swift; Miller v. Race; Young; Lickbarrow: 394; Huff. Nego. Instrs.

Notice of dishonor necessary to bind indorser. Bickerdike; Hopkirk v. Page (1822), 2 Brock, 20 Bigl. L. C. N. & B. 110, 3 Rand. Com. Paper, 1 Pars. N. & B., 1 Pars. Conts. 302 (must be given in all cases, if the maker or drawer had reasonable grounds to expect the paper would be honored); Bickerdike; 2 Rand. Com. Paper, 1199.

Time of notice. Lenox v. Roberts (1817), 2 Wheat. 373, 1 Am. Lead. Cas. 478-494, ext. n., 3 Kent, 107, 3 Rand. Com. Paper, 2 Dani. Nego. Insts., 6 Pars. Conts. 304; Bank v. Swan (1835), 9 Pet. (U. S.), 1 Am. L. C. 480-494; Redf. & Bigl. L. C.

Commercial Paper.—
388, 2 Gr. Ev. 189, Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B.
Mode of communicating. Bank v. Lawrence (1835), 1 Pet. (U. S.) 578, 1 Am. Lead. Cas. 494, Redf. & Bigl. L. C. N. & B. 404, Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B., 1 Pars. Conts. 305, 3 Kent, 105, 107.
Checks. Presentment of, should be prompt. Morris v. Eufaula Bank (1898), 122 Ala. 580, 25 So. 499, 82 Am. St. 95; Bouv. Dic.
Stale checks. Checks are overdue after day of date, but rule requiring presentment is not strict in all cases. 3 Rand. Com. Paper, 1095; Ames v. Merriman (1867), 68 Mass. 294 (ten days); 3 Rand. Com. Paper, 1045, 1103, 1108, 3 Kent, 88; Kirkpatrick v. Puryear (1893), 93 Tenn. 409, 22 L. R. A. 785, n. (indorser); Industrial Co. v. Weakley (1893), 103 Ala. 458, 49 Am. St. 45; Estes v. Lovering Co. (1894), 59 Minn. 504, 50 Am. St. 424, n.
Notice of dishonor is excused by lack of funds, for this is a fraud. Merchants' Bank; 2 Danl. Nego. Insts. 1572, 1586; Hoyt v. Seeley (1847), 18 Conn. 353 (holder must give notice of dishonor); Carew v. Duckworth (1869), L. R. 4 Ex. 313 (reasonable expectation that check would be paid); Bell v. Alexander (1871), 21 Gratt. (Va.) 6; 2 Pars. N. & B. 7; *Cessante,* etc.; *Nullus commodum,* etc.
By accepting a check the holder undertakes to give notice of dishonor, and he will be held to this if the drawer suffers from its omission. Acts indicate the intention. Moller v. Gates; Clayton; *Allegans.* 2 Rand. Com. Paper, 1199 (burden is on holder to show drawer was not injured).
Days of grace, q. v. Bouv. Dic.; 1 Danl. Nego. Insts. 613-634; 1 Pars. N. & B. 390-408, 410; 3 Rand. Com. Paper, 1029-1056, 1606. Custom may regulate days of grace. Mills Case.
Presentment. McGruder v. Bank (1824), 9 Wheat. 598, 1 Am. L. C. 427, Redf. & Bigl. L. C. N. & B. 447, Rand. Com. Paper, Danl. Nego. Insts.; Pars. N. & B., 1 Pars. Conts. 297, 3 Kent, 96, Ror. Intst. Law, 90; Bank v. Smith (1826), 11 Wheat. 171, 1 Am. L. C. 429-460, Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B.; Wallace v. McConnell (1839), 13 Pet. 137-152, 1 Am. L. C. 437-460, ext. n., Redf. & Bigl. L. C. N. & B. 15; 2 Bouv. Dic. 732.
Demand essential to bind indorser. Rushton Case; Zane, Banks, 231-310, 3 Rand. Com. Paper, 1110-1135, 1193-1319.
Form of notice of dishonor is immaterial. The law regards substance, not form. Mills v. Bank (1826), 11 Wheat. (U. S.) 431, 1 Am. L. C. 460, Redf. & Bigl. L. C. N. & B. 358, 26 Am. Rep. 507, 3 Rand. Com. Paper, 2 Danl. Nego. Insts., Pars. Conts., Jones, Construc. Conts. 123 (custom), 2 Gr. Ev., 3 Kent.
Notice in commercial paper generally. Wade, Notice, 702, 1028; Zane, Banks.
Protest; object; purpose; form of. Dupre v. Richard (1845), 11 Rob. (La.) 495, 43 Am. Dec. 214-224, ext. n., 3 Rand. Com. Paper, 1136-1185. Certificate of is *prima facie* evidence. Tate v. Sullivan (1869), 30 Md. 464, 96 Am. Dec. 597-612, ext. n.
The facts showing the protest must be set out as in a return of process. Ticonic Bank v. Stackpole (1856), 41 Me. 321, 66 Am. Dec. 246, 247, 3 Rand. Com. Paper, 1166-1171. *See* CONCLUSIONS OF LAW.
Holder of commercial paper; presumptions in favor of. Cromwell: 26; Swift.
Notice of dishonor must be given and averred. The burden of averment and of proof is upon the holder. Here is presented the intimate relation of contracts and procedure, of substantive and adjective law, which is so prominent in procedure. Zane, Banks, 269-304. Questions about this gave rise to Rushton: 5. A plaintiff shows no ground of recovery until he avers every essential element of a wrong. *See* CAUSE OF ACTION.
Drawing without funds is a fraud. And is deceit and misrepresentation, and this disentitles drawer to his status in law. 2 Danl. Nego. Insts. 1596, 1629, 1630. Duty of bank to pay checks, if it has funds. Marzetti.
Death of drawer is a revocation of the check if known to the bank before acceptance. Hunt; Zane, Banks, 122: cases.
Acceptance essential. Rushton: 5; Zane, Banks, 205-230. A bank wrongfully refusing to accept and pay is liable to the drawer, but not to the drawee. Marzetti.
Negotiability of commercial paper. Overton v. Tyler.
Bank not bound to payee until it accepts is the general rule. 2 Danl. Nego. Insts.. 18-20: cases; Zane on Banks. *Contra:* Fonner v. Smith (1891), 31 Neb. 107, 28 Am. St. 510, 3 Am. R. R. & Corp. Rep. 642, n., 11 L. R. A. 528: cases, 1 Danl. Nego. Insts. 17, 20, 2 Pars. N. & B. 59: cases, 7 L. R. A. 595: cases; Grain; 3 Page, Conts. 1280. *See* ASSIGNATUS.
A check is an assignment of the fund pro tanto, as between maker and payee. Raesser, 112 Wis. 591, 88 Am. St. 979, n. *Contra:* Donohoe Co., 138 Cal. 183, 94 Am. St. 28.
Check good until barred. Bradley v. Andrus (1901), 107 Fed. 196, 53 L. R. A. 432 (necessity of loss to drawer for his discharge).
Bill of exchange. Bank note. Miller v. Race. *Certificate of deposit.* See *id.*; COUPONS; Bouv. Dic.
Check; payment by must be proved; delivery of, insufficient. Bank, 72 Kans. 116, 115 Am. St. 176.
Unaccepted check is no assignment of funds. Clark, 72 Kans. 1, 115 Am. St. 173, n.; Van Buskirk, 35 Colo. 142, 117 Am. St. 182, n.
Oral acceptance of checks. See FRAUDS AND PERJURIES; Van Buskirk, 35 Colo. 142, 117 Am. St. 182, n.
Possession is prima facie evidence of ownership of money, bank bills and commercial paper. Miller v. Race; Bonnell: 185.
Agency; execution of, by agent. L. C. 410.
Promissory notes. Bouv. Dic. I. O. U., effect of. *Id.*
Oral evidence to affect. L.C. 410. L.C. 52, 53, 54, 43 L. R. A. 443-487, ext. n.; Stack v. Beach (1881), 74 Ind. 571, 39 Am. Rep. 113-123, 2 Rand. Com. Pap. 778, 3 *id.* 1903 (indorser, oral evidence to affect); *Expressio unius,* etc.
See PROCEDURE; ACTIONS; PARTIES; DEFENSES; PLEADINGS; EVIDENCE; BURDEN OF PROOF; DAYS OF GRACE; PROVINCE OF COURT AND JURY; 8 Cyc. 17-288.
Generally: Randolph; Daniels; Byles; Parsons; Chitty; 2 Bouv. Dic. 484-485 (negotiable); 2 Gr. Ev. 253*a*-307; Joyce; Defenses to actions on.
COMMON CARRIERS: *See* CARRIER; BAILMENTS. Coggs: 350: cases; Schoul. Bailm.; Hutch. Carriers; Bouv. Dic.
Insure goods unless destroyed by inevitable accident, public enemies, or the fault of the consignor. L.C. 112.

Common.—

Connecting carriers; burden of proof, as to delivery and reception of goods, 101 Am. St. 390-399*n*. *See* Coggs. Sleeping car. 2 Bouv. Dic.; Schoul. Bailm.

COMMON COUNTS: Abolished by codes. Sturges: 111 (pleadings "shall be in ordinary and concise language, without unnecessary repetition," is the command). *See* 2 Bouv. Dic. 433 (money counts); Bliss, Code Pl. 156, 157.

COMMON LAW: Adopted by the states. L.C. 222*a*. Regnal years; a table of, to facilitate computation. *Id.*

It frequently becomes of consequence to know whether parts of the common law, or old statutes, are in force, as under discussions of the Sunday law. See *Id.*

Statutes in derogation of, are strictly construed. Heydon's Case; Oakley v. Aspinwall: 222; *Concordare leges;* Suth. Stat. 289, 400, 441.

As to crimes. McClain, C. L. 12-15; 9 Am. Crim. R. 370.

Revived by repeal. See Repeal; McClain, 102.

Rights from the common law equal to constitutional. Bronson v. Kinzie: 238; § 54, Hughes'. Proc.

Annexes itself by implication. Expressio eorum, etc.; C. v. Hess: 215, 219, 222*a*.

Construction of, involves fundamental knowledge. Heydon's Case; L.C. 215.

Remedial statute should be liberally construed. Boni judicis, etc. *See* Statute; Bro. Max. 195; Crowns.

Repugnant words and clauses should be rejected. See Repugnancy.

"The golden metwand of the common law" leads. Pot. Dwar. 77; Smith, Construc., § 545; L.C. 219.

Codes are construed by the common law. Bliss, Code Pl. 141; Kollock. *See* Codes.

Binds like statutes and constitutions. Controls construction. Suth. Stat. 289-291, 400, 441; Smith, Const. Construc. 530, 524; Sedgk. Stat. 265-279; Pot. Dwar. 77; L.C. 219. Constitutions construed by. L.C. 222, 242.

The common law of a sister state must be pleaded, if relied upon. Crandall v. Great Northern R. R. (1901), 83 Minn. 190, 85 Am. St. 458, n. (how to plead it).

COMMON LAW PRACTICE: *See* Judicature Acts; Bouv. Dic.; Procedure.

Sources of municipal law. 1 Kent, 471-548. Principal publications of the common law. 1 Kent, 499-515. Founded on the civil law. *See* Civil Law; Equity; Maxims.

COMMON LAW RECORD: Mandatory Record. *See* Due Process of Law Record. Defined. §§ 20-22, 27*a*, Hughes' Conts., p. 15; Lewis, Suth. Stat. 27-51. §§ 83-123, Gr. & Rud.; *Audi alteram partem.*

COMMON SCOLD: 2 Bish. Cr. Proc. 179-201; And. Dic. 923; 8 Cyc. 392-393.

C. STANDS FOR COMMONWEALTH; P. for People; S. for State; R. for Rex or Regina (King or Queen); U. S. for United States.

C. v. ALGER: *Sub Sic utere.* In construing a statute every part of it must be considered and given effect. 35 Wis. 557; *In pari materia.*

C. v. BEAN: L.C. 226.

C. v. CLAP: *Sub* C. v. Selfridge.

C. v. CUMMINGS: *Sub Res adjudicata.*

C. v. EASTMAN: L.C. 22.

C. v. GANNETT: L.C. 213*g*.

C. v. GERARDE (1891), 145 Pa. 289, 27 Am. St. 639. Burden of proof. L.C. 185. Of insanity: McNaghten: 195; S. v. Marler: 188.

C. v. HART: L.C. 227.

C. v. HESS: L.C. 215.

C. v. HITE (1835), 6 Leigh (Va.) 589, 29 Am. Dec. 226-235, n., 3 Wash. R. P. 48. § 326, Hughes' Proc.

Escheats; acquisitions of lands by sovereignty (the crown or state); proceedings; doctrines. 3 Wash. R. P. 43-49, 4 Kent. 424-426, 4 Gray, Cas. Prop. 1-6; Hamilton v. Brown (1895), 161 U. S. 256; Atty. Gen. v. Sands (1670), Hardres, 488, 2 Freem. 129, Tudor, L. C. Conv. 760, 8 Rul. Cas. 150, n.; 1 Brown, C. C. 201, Reg. Liv. 1782, B. fol. 568*h*, 8 Rul. Cas. 161, 28 Eng. Reprint, 1083; Burgess v. Wheate (1759), 1 Wm. Bl. 123, 1 Eden, 177, 10 Rul. Cas. 614-672, n., 28 Eng. Reprint, 652.

C. v. HOLDER: Sub Larceny.

C. v. HUNT (1842), 4 Met. 111, 3 Am. Dec. 346, n. Conspiracy as a crime. U. S. v. Cassidy; L.C. 22.

C. v. KANE: L.C. 183.

C. v. MACLOON: L.C. 172.

C. v. MASH (1842), 7 Met. (Mass.) 472, 65 Cent. L. J. 68, Clark, Cas. 127, Laws. Lead. Cas. Simp. 30, Bish. Stat. Crimes, 356, 8 Rul. Cas. 45, Bish. Stat. Crim. 356, 364, 1 Bish. C. L. 211, 303*a*, 903, 923, 3 Gr. Ev. 21.

Cited: § 294, Gr. & Rud.

Bigamy; intent is no element in statutory crime. Actus non facit, etc.

Bona fide belief in death of former husband or wife no defense. R. v. Tolson (1889), 23 Q. B. 168, 16 Cox, C. C. 629, Beale, Crim. Cas. 68, 12 Crim. Law Mag. 96-119, 8 Rul. Cas. 16-89, n., Clark, Crim. Cas. 55. Suth. Stat. 355, n., 1 Bish. C. L. 291*b*, 303*a*, 395. *Mens rea.* 8 Rul. Cas. 16-89.

C. v. McKIE: L.C. 187.

C. v. MOORE (1905), 28 Ky. Law Rep. 642, 88 S. W. 1085, 2 L.R.A. (N. S.) 719-721, n.

Tacking and collateral intent; limitations. A robber shot at while committing a robbery is not guilty of murder if he is missed and a bystander is killed. C. v. Campbell, 7 Allen, 541, 83 Am. Dec. 705; Butler v. P., 125 Ill. 641, 1 L. R. A. 211, 8 Am. St. 423.

Where several act out to do an unlawful act, each is liable for the act of the other. Spies v. P. But they are not liable for consequences resulting from defense by third persons to their criminal acts. Laidlaw v. Sage, *sub* "Squib Case." This technical rule is important and deserves needful consideration.

C. v. NEAL (1813), 10 Mass. 152, 6 Am. Dec. 105, 1 Lead. Crim. Cas. 81-94, 3 Crim. Def. 70, ext. n., 33-118; Clark, Crim. Cas. 141, 19 L. R. A. 359, 1 Bish. C. L. 358, 359, 361, 13 Crim. Law Mag. 337, *cited,* § 348, Hughes' Proc.; §§ 294, 296, 300, 302, Gr. & Rud.

Criminal law; coercion of wife by husband. Bibb v. S. (1891), 94 Ala. 31, 33 Am. St. 88-98, 3 Gr. Ev. 7; 39 W. Va. 486, 45 Am. St. 934, 2 Best, Ev. 428; R. v. Torpey (1871), 12 Cox, C. C. 45, 19 L. R. A. 358, 1 Bish. C. L. 362, 363; Gill v. S. (1894), 39 W. Va. 479, 45 Am. St. 928 (married woman liable for torts, and her property subject to execution therefor). *See* Coercion.

Torts; husband liable for torts of wife. Bish. Torts, 527-543; Flesh v. Lindsay (1893), 115 Mo. 1, 37 Am. St. 374, n., 2 Kent, 149; Strouse v. Leipf (1894), 101 Ala.

C. v. Neal.—
433, 46 Am. St. 122, 23 L. R. A. 622, n. (premises occupied by wife).
Doctrine of marital unity in the modern criminal law. 13 Crim. Law Mag. 325-342.

C. v. ROBY: L.C. 74.

C. v. ROGERS: L.C. 199.

C. v. SELFRIDGE (1806), H. & T. S. D. (1 Crim. Def.) 1-34, Whart. Hom. 693-703; Starr v. U. S. (1893), 153 U. S. 614, 621; *cited,* Bish. C. L. 305, 2 *id.* 703, 716; §§ 71, 294, 296, Gr. & Rud.

Case stated: Selfridge published of Austin, Sr., by posting notices in a public place, that he was a coward. Austin, Jr., aged eighteen, a student of Harvard and an athlete, prepared and met S., who was a delicate and slender man. Selfridge shot and killed A., Jr., while he was laying on the flogging with a walking stick. S. was barely acquitted upon grounds of self-defense.

One cannot provoke an altercation and then make full defense; afterwards "retreating to the wall" will not do. Stoffer v. S. (1864), 15 O. St. 47, 86 Am. Dec. 470, 1 Bish. C. L., 1 Wh. Ev. 412, Beale, Crim. Cas. 97. L.C. 154.

Qui primum peccat ille facit rixam was not applicable to Selfridge as it was to Shepherd in the "Squib Case"; Rowe, 164 U. S. 546 (retreating to the wall).

Homicide; self-defense. Nullus commodum capere potest de injuria sua propria: No man should take advantage of his own wrong. The necessity for slaying must not be provoked by the slayer. *Volenti non fit injuria;* U. S. v. Holmes; Stewart v. S. (1850), 19 Ohio, 302, H. & T. S. D. (1 Crim. Def.), 191, 53 Am. Dec. 426-430, n.

Criminal libels are repressed for reasons of Salus populi suprema lex. C. v. Clap (1809), 4 Mass. 163, 3 Am. Dec. 212-214, 9 Rul. Cas. 193, Bish. Cr. Law, New. Def.; wherein this notice was posted: "Notice, Cable Haywood is a liar, a scoundrel, a cheat and a swindler. Don't pull this down." *Held:* A libel, and the truth of it is no defense, for such notice is calculated to cause a breach of the peace. *Salus,* etc.

Truth is no defense in a criminal libel. R. v. Grant (1834), 5 Barn. & Adol. 108 (27 E. C. L. R.), 23 N. & M. 105, 9 Rul. Cas. 186. *See* Harrison.

Slander of women indictable. Dickson v. S. (1895), 34 Tex. Cr. Rep. 1, 53 Am. St. 694.

C. v. SMELLING (1834), 15 Pick. 321; 1 Bish. Cr. Proc. 643-646.

Due administration of justice. A court has inherent power to order a defendant in a criminal case to furnish a bill of particulars in order to apprise the prosecution of what will be relied upon in defamation suit, where the defense is truth of the charges in justification. This bill limits the defense to the items specified. *Expressio unius,* etc. Kollock.

C. v. YORK: L.C. 197.

COMMUNIS ERROR FACIT JUS: Common error sometimes passes current as law. Bro. Max. 139, 140; Suth. Stat. 309, Powell, App. Proc. 729; Kelly v. Bemis; King v. Philadelphia Co.; Maher v. S.; Hitchcock v. Galveston; Beard v. Hopkinsville.

Communis.—
Consensus, etc.; *Modus et conventio,* etc. Max. 14, §§ 178-180, Hughes' Proc.
Cited, § 297*a*, Gr. & Rud.; §§ 168, 169*a*, 185, 270, 291, 298, 328, Hughes' Proc.
One inviting error cannot complain of it. 2 Encyc. Pl. & Prac. 516, 517. *Volenti non fit injuria.* See *Consensus tollit errorem.*
Acquiescence will not validate an unconstitutional tax. S. v. Ide (1904), 35 Wash. 576, 67 L. R. A. 280.

COMPLAINTS (AND PETITIONS); what they shall contain. *See* Rushton v. Aspinall (common law rule reaffirmed in codes).
Must contain a cause of action. Bliss, Code Pl. 200, 417, 436; Phillips, Code Pl. 29, 183, 461-470. Must state facts. § 278, Gr. & Rud.

COMPOSITION WITH CREDITORS: *See* Cumber: 311.

COMPOUNDING OFFENSES: § 92, Hughes' Conts.; McClain, C. L. 938-940; Collins; Bouv. Dic.; 8 Cyc. 492-497; 9 Cyc. 505-515.

Compounding offenses; illegal contracts. Collins v. Blantern. *In pari;* Holman: 363; § 92, Hughes' Conts. Jones v. Rice (1836), 18 Pick. (Mass.), 440, 2 Lead. Crim. Cas. (B. & H.) 239-247, 29 Am. Dec. 612, 613; Partridge, 120 Mass. 403, 21 Am. Rep. 524, Huff. Conts.; 2 Chit. 902, 1 Page, 417; 2 Beach, Conts. 1440; Davis v. Smith (1894), 68 N. H. 253, 73 Am. St. 584; Keir v. Leeman (1844), 6 Q. B. (Adol. & El.) 308 (51 E. C. L. R.), 2 L. Cr. Cas. 216, 9 Q. B. (Adol. & El.), 371 (1846), (58 E. C. L. R.), 2 Lead. Crim. Cas. 221, n. Affirmed in error, 9 Q. B. 371, 6 Eng. Rul. Cas. 376-492, ext. n., 66 R. R. 392: *stated,* Ans. Conts. 135, Bish. Conts. 493-495; Partridge, *cited,* 1 Sedgk. Dam. 36, Bro. Max. 721, 2 Rand. Com. Paper, 504, 1 Pars. N. & B. 196, 215, Gr. Pub. Pol. 456, 1 Pars. 455, 2 Chit. Conts. 991-993, 1 Sto. Eq. 294; Friend v. Miller (1893), 52 Kan. 139, 39 Am. St. 340, n. (note given to compound is illegal); Miller v. Minor Lumber Co. (1893), 98 Mich. 163, 39 Am. St. 524 (right to settle for an injury inflicted is allowable); Cass County Bank v. Bricker (1892), 34 Neb. 516, 33 Am. St. 649, n.

Compounding offenses; illegal contracts. No valid contract can be made to stifle the prosecution of a public offense. Fraud upon public justice cannot become the basis of a legal contract. Collins; Gr. Pub. Pol. 441-446. C. v. Pease; Jones; Holman; R. v. Burgess; City Nat. Bank (note given to compound not void, unless given by wife to protect husband), 2 Beach, Conts. 1440. C. v. Pease (1819), 16 Mass. 91; *cited,* Greenh. Pub. Pol. 436, 1 Bish. C. L. 267, 275, 709-715*a*, 2 *id.* 401.

Pease stated: P., learning that his servant was embezzling from him, agreed to keep the matter a secret if the thief would give him (P.) a note for $100, which was done. Then the maker died, and his executor refused to pay the note. P. was then prosecuted, and convicted for compounding a crime.
It is the duty of every one to inform the officers of the law of its infractions, the failure to do which is also a crime, and a private citizen may arrest for a felony committed, and he must join a *posse comitatis,* if requested. *Salus populi,* etc.; R. v. Hughes.

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Compounding crimes; elements of offense. A written agreement not to prosecute for crime is an illegal compact and void. *R. v. Burgess* (1885), 16 Q. B. D. 141, 15 Cox, C. C. 779, 3 Crim. Def. 779; cited, 1 Bish. C. L. 711.

Holman v. Johnson; *In pari:* In equal fault the possessor's case is the better. Collins; Keir; Jones; C. v. Pease.

Silently witnessing a felony and not communicating it to officers of the law is misprision of felony. Sub Allen v. Wright. If, to knowledge, assent is added, such party becomes an accessory. Punishment for this offense is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners and other officers are contained in 3 Edw. 1, ch. 9. *See* also Flower v. Sadler (1882), L. R. 10 Q. B. D. 572. *Salus populi*, etc.

One may contract for a return of his property or for compensation. Schirm, 103 Md. 541, 118 Am. St. 373, n.

Compounding, generally. C. v. Pease; *In pari*, etc.; 1 Bish. C. L. 709-715, n. *Misprision.* 1 Bish. C. L. 716-722.

Blackmail; threat to accuse of infamous crime. Threatening a father to accuse his son of an abominable offense upon a mare, with intent to extort money, is an indictable offense. R. v. Redman (1865), L. R. 1 C. C. R. 12, 10 Cox, C. C. 159; stated, 3 Jac. Fish. Dig. 3628; cited 2 Bish. C. L. 1200. Mann v. S., 47 O. St. 556, 11 L. R. A. 656, n.

It is immaterial whether the person against whom the accusation is threatened be innocent or guilty, if the prisoner intended to extort money. R. v. Gardner (1824), 1 C. & P. 470 (12 E. C. L. R.).

It must be alleged that the offense was committed. S. v. Hodge, 142 N. C. 665, 7 L. R. A. (N. S.) 709.

Generally: 2 Bish. C. L. 1200, 1201, n.; 4 Crim. Def. 824-837.

Evidence is inadmissible to show that the prosecutor is guilty. However, to affect his credibility he may be cross-examined with reference to it.

Compounding a felony; extorting money. Guilt or innocence of the prosecutor is material to determine whether the accused is guilty of blackmail or compounding a felony. R. v. Richards (1868), 11 Cox, C. C. 43. *Defined.* Edsall v. Brooks (1864), 2 Robertson (N. Y. Sup. Ct.), 29, 34, 17 Abb. Prac. (O. S.) 226, 26 How. Prac. 431. Extortion is closely allied with. American Steamship Co., *sub* C. v. Bagley, *post.*

Extorting money or property by threats. Mann v. S. (1890), 48 Ohio, 556, 11 L. R. A. 656, n.

Threatening letters and other threats. 2 Bish. Cr. Proc. 1024-1029*b*; Mann v. S., *supra.*

Oral threats sufficient under some statutes. R. v. Redman.

B., a jailor, was allowed twenty cents for turning the key for each ingress and egress of an imprisoned debtor, but B. charged him forty cents for ingress alone, for which B. was indicted. B. insisted that the forty cents would soon and certainly be earned, and therefore its reception was defensible. *Held,* he was guilty

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of extortion. C. v. Bagley (1828), 7 Pick. (Mass.), 279; cited, 1 Bish. C. L. 294, 573, 2 *id.* 392, 395, 399, 404.

Extortion; misconduct in office; what is. See American Steamship Co.: *cited,* Gr. Pub. Pol. 328, 2 Kent, 451, n.

Intent no element in oppression and extortion. Leggatt v. Prideaux (1895), 16 Mont. 205, 50 Am. St. 498; U. S. v. Waitz (1876), 3 Sawyer (U. S. Cir. Ct.), 473 (officer taking or charging official and other fees in a gross sum is guilty of extortion); Cobbey v. Burks (1880), 11 Neb. 157, 38 Am. Rep. 364, 365; Steele v. Williams, 8 Ex. (Eng.) 624, 17 Jur. 464, 22 L. J. Exch. 225; P. v. Gardner (1894), 144 N. Y. 119, 43 Am. St. 741; C. v. Mitchell (1867), 3 Bush (Ky.), 25, 96 Am. Dec. 192-196, ext. n.; Brackenridge v. S. (1889), 27 Tex. 513, 4 L. R. A. 360, n.; Hooker v. Gurnett (1858), 16 U. C. Q. B. 183. *Actus non facit reum,* etc.; *Res ipsa loquitur;* P. v. Roby.

Receiving larger amounts than are justified by law for official services constitutes oppression—extortion. Intent is immaterial. "Sound public policy, therefore, requires that an officer should be held to act at his peril, and we are of the opinion that the absence of a corrupt motive or the existence of an agreement by the party furnishes no justification for doing what the law forbids."

Coates, 17 Serg. & R. (Pa.) 75-77. *See* Leeman v. S. (1880), 35 Ark. 438, 37 Am. Rep. 44-48 (intent to extort an element in a criminal case); U. S. v. Waitz, *supra;* 2 Gr. Ev. 506; Leggatt, *supra;* Mech. Pub. Off. 1025. *Contra:* Hurd v. Atkins (1892), 1 Colo. Ap. 449 (corruption of clerk must be proved beyond a reasonable doubt, else he is not liable for return of fees in a civil action. He may demand and receive with impunity, unless guilty knowledge is alleged and proved. A poorly reported case). *See* American Steamship Co.

Extortion an indictable crime. 2 Bish. C. L. 390-408 (5th ed.). An officer can neither contract nor take more nor less than exact legal fees. Gr. Pub. Pol. 328; *In pari delicto,* etc.; 4 Crim. Def. 307-321. It is no defense to show that the party paying the fees agreed to pay them. Robinson v. Ezzell (1875), 72 N. C. 231; 7 Am. & Eng. Encyc. Law, 597. § 18, Hughes' Conts, and maxims there cited.

During the crusades and the turbulence of those times, officials of the courts of England became very oppressive and extortionate, and this caused the passage of excessively repressive measures. (3 Edward I.) The crime was more odious than robbery at common law. 7 Bac. Abr. 324. It involves official corruption and usurpation in that form which is intolerable and inexcusable from any view. It is no defense to show that the party paying the fees agreed to pay them. Robinson, *supra. Volenti non fit injuria* does not apply here. Stow v. Converse (1820), 3 Conn. 325, 8 Am. Dec. 189-198.

Generally, statutory law is involved, but these are very similar in character and effect, and in most cases are affirmative of the common law. And. Dic. 438, 4 Bish. C. L. 390-408. § 3169, R. S. U. S., is affirmative of the common law. U. S. v. Deaver (1882), 14 Fed. 595; Woodgate v. Knatchbull (1787), 2 Term Rep. (D. & E.), 148; *cited.* 2 Add. Torts, 924, 936. 948, Murfree, Sheriffs.

Moneys had and received. Action for, will

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lie for excessive charge by an officer. Cool. Torts, 507. The law at the time of payment creates an obligation to refund.
Blackmail is closely allied with. . R: v. Redman. Malfeasance; nonfeasance, in office. 2 Bish. C. L. 971-982.
COMPROMISE: As a consideration. Stapilton v. Stapilton, White & Tud. Lead. Eq. Cas. 1675-1737, ext. n., 12 Rul. Cas. 100-138, n., § 122, Hughes' Conts., Pars.; 1 Chit. 47, Bigl. Fraud; Kerr, Fraud; Pom. Eq., Bisph. Eq.; Beach, Eq.; Perry, Trusts; 17 R. I. 406; 13 L. R. A. 604; Longridge; Bouv. Dic.; 8 Cyc. 499-542.
Compromise of suit; when a good consideration. Longridge; White v. Bluett; Edwards v. Baugh; Callisher v. Bischoffscheim; Banner, *Ex parte;* Blythe, *In re* (1881), 17 L. R. Ch. Div. 480, 2 Mews, E. C. L. 676, Lang. Conts., §§ 74, 85, 122, Hughes' Conts.; Cumber: 311: cases.
COMPTON v. JONES (1825), 4 Cow. 13, 2 Am. Lead. Cas. 45, Huff. & W. Conts. 444; Bish. Conts. 1181; §§ 326, 330, Hughes' Proc.
Assignment; notice of, is essential to protect assignee. Ans. Conts. 222, Wade, Notice, 432-436; Schilling v. Mullen (1893), 55 Minn. 122, 43 Am. St. 475, n., 1 Beach, Eq. 343.
Assignee first giving notice to debtor of the assignment has priority. Wade, Notice, 433; 2 Lead. Eq. Cas. (W. & T.), 1660, 3 Rul. Cas. 523-556, n.; *Qui prior est tempore; Assignatus. See* ASSIGNMENTS.
COMPULSION: *See* DURESS; SASPORTAS. No excuse for crime. *Necessitas inducit.*
COMPUTATION OF TIME: Warren v. Slade: 243. Rule as to the first and last days in computation of time. Halbert v. San Seba Springs Ass'n (1896), 89 Tex. 230, 49 L. R. A. 193-248, ext. n. To a date does not include it. 69 Kans. 49, 105 Am. St. 146.
CONCEALED WEAPONS: 4 Am. Crim. Rep. 99, 9 *id.* 156 (justification for carrying). *In re* Brickey (1902), 8 Ida. 597, 101 Am. St. 215, n. (Validity of statutes.) City, 72 Kans. 230, 115 Am. St. 196-203, n.
CONCEALMENT: *See* Carter v. Boehm; Pasley: 375.
CONCESSIO PER REGEM FIERI DEBET de certitudine: A grant by the king ought to be a grant of a certainty. 9 Coke, 46. *See* CERTAINTY.
All conveyances must be certain.
CONCESSIO VERSUS CONCEDENTEM latam interpretationem habere debet: A grant ought to have a liberal interpretation against the grantor. *Verba fortius,* etc.; *Ut res magis,* etc.
CONCLUSION OF LAW: A nullity. § 24 Gr. & Rud.; Hanford v. Davies: 86; U. S. v. Cruikshank: 232. §§ 99*a*, 118, 137, 178, 226, 268, Gr. & Rud. Is surplusage. 205 U. S. 257.
A court is bound by its record. §§ 56-61, 239-256, 269, Gr. & Rud.; *see* JURISDICTION.
Its record must be certain. § 238, Gr. & Rud. *De non apparentibus.*
A matter must be juridically presented to be judicially considered. De non apparentibus; Dolus; Ex facto oritur jus. §§ 163, 263, 268, Gr. & Rud.
Conclusions of law: A general or sweeping charge that will admit an undefined range of evidence is a conclusion of law, as that one stole an "animal." Such a charge would not sustain a verdict or sentence.

Conclusion.—
Such a charge would also fail from an application of the rule in Dovaston v. Payne (every presumption is against a pleader—*Verba fortius,* etc.), there being some animals that are not a subject of larceny, *e. g.*, man.
The Dicastery employed sweeping charges against Socrates by accusing him of "corrupting the Athenian youth."
The charges against Paul were, that he was "a pestilent fellow" and "a preacher of sedition." These charges were intended to arraign him for preaching a new dispensation not in accord with the Mosaic laws, and for denouncing the judicial methods of the Jewish courts, wherein conclusions of law were upheld, so that there could be no protection from rules arising from variance and departure. Upon these the theory of the case is founded in some states. Protection depends upon the rules excluding generalities and departures. *Dolus versatur,*
Conclusions of law, general denials and issues are not the best servitors of the conserving principles of procedure. §§ 83-123, Gr. & Rud. They are often used for chicane and covin. § 50, Gr. and Rud.
Conclusions of law are insufficient. L.C. 2, 21, 86, 232; U. S. v. Hess, 124 U. S. 483, *cited,* 198 U. S. 4: cases; Taylor v. Sprinkle (Ill.); §§ 11, 13, 28, Hughes' Proc.; 124 U. S. 187; Virginia Coupon Cases; Brown v. City (Mo.); *Dolus.*
Following the language of the statute may not be sufficient. U. S. v. Cruikshank: 232; U. S. v. Carll, 105 U. S. 611, *cited,* 124 U. S. 488, 198 U. S. 4.
Denial of, does not aid; they are void. *Quod ab initio.* They cannot be aided. Mallinckrodt: 12*a*; *see* AIDER; CAUSE OF ACTION; Hughes' Proc.: CONCLUSION.
Facts, not conclusions, must be pleaded. "That a wife duly acknowledged," is a conclusion of law and is insufficient after verdict. Roy, 22 Tex. 626, 632 (citing *Catlin v. Glover;* only facts well pleaded are admitted by general demurrer).
Every presumption against a pleader. 22 Tex. 631; *Mure v. Kaye* (1811), 4 Taunt. 34 (justification for an arrest must be pleaded; facts and circumstances must be set out); Chit. Pl. 236, Gould, Pl. 182; *Camp v. Gaines* (1852), 8 Tex. 372 (stating limits of liberal rule—aider by pleading over—when good on collateral attack).
"A full, clear statement is required by the statute." 32 Tex. 631; 1 Chit. Pl. 233. *De non apparentibus,* etc. *Allegata* must exist. Townes, El. Law. 455; *Mims,* 1 Tex. 443; *Paul,* 7 Tex. 338, 345; *Smith v. Lipscomb,* 13 Tex. 532, 542; Rives v. Foote (1854), 11 Tex. 662, 670 (must give a defendant notice—*Expressio unius,* etc.); Glasscock v. Hamilton (1884), 62 Tex. 143 (conclusion of law insufficient; an answer consisting of legal conclusions, deductions from facts not disclosed, and vague reference to facts dimly portrayed, is no defense). *Ambiguum placitum,* etc.; Walton

Conclusion.—

v. Reager (1857), 20 Tex. 103, 106 (illustrations of bad answer). Proof without allegation is surplusage and of no avail—can not be received and is never available for any use. *Paul v. Perez; Smith v. Rives:* cases, *supra. Shutte v. Thompson:* 291. *See* ALLEGATIONS.

Caveat emptor from the record; it must be sufficient; limits of rule. *Walton v. Reager, supra. See* CONSTRUCTIVE NOTICE.

Jurisdiction depends upon sufficient charge and description. Nelson, *In re* (1899), 131 U. S. 176, *cited,* 198 U. S. 2: cases; Cruikshank: 232 (a sufficient indictment essential); *see* ALLEGATIONS; ASSIGNMENTS OF ERROR.

A general mode of pleading is sometimes permissible to avoid prolixity. Sto. Pl. 245-253: cases; C. v. Kane: 183: cases; § 53, Gr. & Rud. *See* Chicago v. P., 215 Ill. 235, also Hughes' Proc. for further illustrations.

In ejectment and replevin actions conclusions of law and general issues have long been countenanced. Aslin.

Code provisions declare the conclusion of law in some specified matters sufficient, e. g., in relation to slander and libel, judgments of inferior and statutory courts and officials and conditions precedent. *See* § 53, Gr. & Rud. (Convenience).

Statutes cannot impose upon the courts. Huntsman v. S.: 231; Hughes' Proc.: CONCLUSIONS; Howard v. S.: 166.

CONCORDARE LEGES LEGIBUS EST optimus interpretandi modus: To make laws agree with laws is the best mode of interpreting them. End. Stat. 182, Suth. Stat. 215, 217, 219, 239-246, 260; Heydon's Case; Dennis v. Bank (1900), 127 Cal. 453, 78 Am. St. 79. *Cessante ratione,* etc.; *In pari materia,* etc.; *Scientia sciolorum,* etc.; *Scire legis,* etc.; *Interpretare et concordare,* etc.; *Verba nihil operari melius est quam absurde; Verba,* etc.; *Verba offendi,* etc.

The common law is preserved if possible. Statutes in derogation of the common law are strictly construed. *Verba intentione debent inservire. Cited,* pages 32, 33; §§ 5, 9, 16, 17, 19, 22, 24, 29, 37, 42, 45, 50, 52, 122, 159, 214, 236, Hughes' Proc. *Cited,* §§ 79, 115, 119, 120, 134, 137-140, 152, 159, 217, 227, 234, 262, Gr. & Rud.

Constitutions are construed subject to fundamental principles. L.C. 215-232. S. *ex rel.* Henson v. Sheppard (Mo.); Church v. U. S.; U. S. v. Farenholt (1907), 206 U. S. 222. Statutes also, L.C. 222-225*a*. *See* 27 Utah, 387, 101 Am. St. 971.

Codes are liberally construed to advance remedies and repress wrongs. Boni judicis, etc.; *Lex non exacte,* etc. Kollock; Crowns (code cases); Indianapolis R. R.: 223. *See* CODE; CONSTRUCTION: PROCEDURE. They must be construed to maintain the means, the integrities of the conserving principles of procedure. These depend upon the mandatory record, the necessity of facts therein and the record rule. §§ 83-123, Gr. & Rud.

CONDITIONAL SALES: Mortgages and conditional sales; distinctions. Turnipseed, 16 Ala. 501, 50 Am. Dec. 190-199, ext. n.; Eiland, 7 Ala. 724, 42 Am. Dec. 610; Crompton, 62 Conn. 25, 36 Am. St. 323, n.; notes *Twyne's Case,* 1 Smith L. C., 1 Mech. Sales, 503-693; 94 Am. St. 234-258.

If uncertain as to which, a mortgage is preferred. *See* MORTGAGES; Howard v. Harris; 1 Beach, Eq. 414.

When valid against bona fide purchasers.

Conditional.—

Schmaltz v. York Co. (1902), 204 Pa. 1, 93 Am. St. 782, n. *See* Bentley.

Conditional sales valid against creditors. Lewis v. McCable (1882), 49 Conn. 141, 21 Am. Law Reg. 217-235, n.; 20 Colo. 313, 46 Am. St. 291-298, n., 2 Kent, 498, Benj. Sales; Bailey v. Harris (1859), 8 Iowa, 331, 74 Am. Dec. 312, n. (may be on condition that entire purchase price be paid before title passes); White, *Re,* v. Solomon (1895), 164 Mass. 516, 30 L. R. A. 537. *See* George v. Tufts (1875), 5 Colo. 162-166; Weber v. Diebold, etc. Co. (1892), 2 Colo. Ap.; 28 Utah, 419, 107 Am. St. 731.

Contracts of "sale and return." Sturm v. Boker (1893), 150 U. S. 312; Zuchtmann v. Roberts (1871), 109 Mass. 53, 12 Am. Rep. 663 (possession with receipt will not conclude or estop owner).

One having the indicia of title may sell property and divest the owner thereof. Allegans contraria, etc.

Generally: 2 Lead. Eq. Cas. 1049-2014; Cole v. Hines (1895), 81 Md. 476, 32 L. R. A. 455-472, ext. n., Benj. Sales; Lundy Furniture Co. v. White (1900), 128 Cal. 170, 79 Am. St. 41 (lease to be sale if instalments are paid); 1 Mech. Sales, 503-693.

Webster on. Notes, Twyne's Case, Smith, Lead. Cas. (8th ed.); Cole v. Hines (1895), 81 Md. 476, 32 L. R. A. 455-472, ext. n. (remedies of seller); 20 Colo. 313, 46 Am. St. 291-298, n. (valid against creditors). *See* Benjamin on Sales; Zuchtmann; Tarling v. Baxter: cases. L.C. 404.

CONDITIONS: Burdis v. Id. (1898), 96 Va. 81, 70 Am. St. 825, n., 1 Beach, Conts. 87-146. *See* Bouv. Dic.; 8 Cyc. 555.

In restraint of alienation. See *Alienatio,* etc.

In restraint of marriage bond. Egerton v. Brownlow; Scott v. Tyler; Lowe v. Peers.

Alleging performance of. See PERFORMANCE OF CONDITIONS. Code provisions for. Bliss, Code Pl. 301, 302. § 53, Gr. & Rud.

Doctrines of. Dumpor's Case; § 148, Hughes' Conts. *Conditions in leases.* Dumpor's Case; § 148, Hughes' Conts.

Validity of conditions and restrictions in deed. Wakefield v. Van Tassel (1903), 202 Ill. 41, 95 Am. St. 207-224, ext. n.

Conditions precedent to suing on a contract; stipulations for must be respected. Cutter: 311; Scott v. Avery; *Lex neminem cogit,* etc.; Ryan v. Cudahy (1895), 157 Ill. 108, 49 L. R. A. 353-403, ext. n. Arguments to arbitrate, how viewed. 116 Ky. 287, 105 Am. St. 219.

Condition subsequent; how enforced in case of breach. Trustees of Union College v. City of New York (1902), 173 N. Y. 38, 93 Am. St. 569-578 (how taken advantage of).

Transferability of a right of entry for conditions broken. Bouvier v. Baltimore R. R. (1902), 67 N. J. Law, 281, 60 L. R. A. 750. *See* FUTURE INTERESTS.

Condition upon which a surety is liable is strictly judged. *Non hæc.*

CONDUCTORS' BENEFIT ASS'N v. Leonard: L.C. 294.

CONFESSION OF JUDGMENT: Power to confess a judgment must be clearly given and strictly pursued. Myer v. Pick (1901), 102 Ill. 561, 85 Am. St. 352, n.

CONFESSIONS: Bram v. U. S. (1897), 168 U. S. 352, 42 L. ed. 568, ext. n.; 1 Gr. Ev. 213-235; Gill. Ind. Ev. 98-123; 6 Am. St. 238-252, ext. n.; 55 Am. St. 17, n.; 1 Bish. Cr. Proc. 1216*a*-1246; 8

Confessions.—
Rul. Cas. 90-106, n.; 10 Am. Crim. Rep. 226, 227; 12 Am. Rep. 59-201; 12 Cyc. 459-497; 21 Cyc. 874; 1 Ell. Ev. 271-296.
Prosecutor must show affirmatively that a confession was voluntary, and not the result of an inducement held out. If there are doubts about this, the confession is inadmissible. R. v. Warringham (1851), Surrey Spring Assizes, 2 Lead. Crim. Cas. (B. & H.) 487, 530, ext. n.; 8 Rul. Cas. 92; 1 Best, Ev. 62, 2 *id.* 551; 4 Mews' E. C. L. 1818.
Confessions must be voluntary, and prosecution must show this. R. v. Fennell; R. v. Johnston; R. v. Baldry; R. v. Moore, 25 R. I. 105, 105 Am. St. 204, n.; *Nemo tenetur seipsum accusare; Res inter alios.* A constable told a prisoner in his custody that "he need not say anything to criminate himself; what he did say would be taken down and used against him," but the prisoner confessed. *Held,* this was admissible against him. R. v. Baldry (1852), 2 Den. C. C. 430, 5 Cox, C. C. 523, 12 Law & Eq. Rep. 590, 2 Lead. Crim. Cas. 484-630; 4 Mews' E. C. L. 1825; R. v. Warringham, 8 Rul. Cas. 92; 2 Best. Ev. 551. *Cited,* § 294, Gr. & Rud.
Confessions. R. v. Moore; Nolen v. S., 14 Tex. Ct. App. 474, 46 Am. Rep. 247-260, n.; Heidt, 20 Neb. 492, 57 Am. Rep. 225-242; *Nemo tenetur,* etc.; *Res inter alios;* Bouv. Dic.
Wife of a person in whose house a crime is committed, and not otherwise connected with the prosecution, is not a person in authority within the rule which excludes confessions. R. v. Moore (1852), 2 Den. C. C. 522, 5 Cox, C. C. 555, 12 Eng. L. & Eq. R. 583, 3 Car. & K. 153 (61 E. C. L. R.), 2 Lead. Crim. Cas. (B. & H.) 499-530; 4 Mews' E. C. L. 1818.
Admissions cannot be extorted; prisoners must be dealt with fairly. R. v. Histed (1898), 19 Cox, C. C. 16, 11 Am. Crim. R. 167.
Confessions elicited by questions. A disguised constable intercepted a thief, and questioned her relative to the theft. He did not caution her, and she confessed. *Held,* that the confession was admissible. R. v. Johnston (1864), 15 Ir. Law Rep. 60, 2 Lead. Crim. Cas. (B. & H.), 504-630.
Confessions; inducements. Officers having a prisoner in charge remarked to him: "The inspector tells me you are making housebreaking implements. If that is so, you had better tell the truth; it may be better for you." His confession was admitted in evidence against him. *Held,* error. For a confession to be admissible evidence against a prisoner, it must have been made freely and voluntarily. If it was made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority, it cannot be used. R. v. Fennell (1881), 7 Q. B. D. 147, 14 Cox, C. C. 607; 4 Mews' E. C. L. 1812; R. v. Johnston; R. v. Baldry; R. v. Moore; R. v. Warringham.
Religious or moral exhortations, not connected with temporal matters, will not vitiate. R. v. Wild, 1 Moo. C. C. 452.
Police officers, constables, etc., have no business to ask prisoners in their custody questions relating to the offenses they are charged with; and, indeed, it is doubtful whether a confession made under such circumstances would be admissible in evidence. R. v. Gavin (1885), 4 Mews' E. C. L. 1825, 5 Mews, *Id.* 151; 15 Cox, C. C. 656. But *see* R. v. Thornton, 1 Moo. C. C. 27, and R. v. Kerr (1837), 8 C. & P. 176 (34 E. C. L. R.); 4 Mews, 1319, 1825; R. v. Mick, *infra.* Bro. Max. 968 (statute involved). *Voluntary confessions admissible.* Hardy v. U. S. (1902), 156 U. S. 224. *Corpus delicti* must first be proved. 9 Am. Crim. Rep. 383; Mathews v. S.
CONFIRMATION: Essential in judicial sales. Bloom: 266; Williamson: 65; Bouv. Dic., And. Dic.
In all judicial sales there must be a confirmation. Unless the record shows this fact, the proceedings are open to collateral attack.
CONFLICT OF LAWS: Van Voorhis.
CONFUSION AND ACCESSION: Jewett v. Dringer; Bright v. Boyd.
Fixtures; house built on lands of another. Bright; Bull.
Confusion of chattels. Jewett. *When owner of part takes all.* Rust Land Co. v. Ison (1902), 70 Ark. 99, 91 Am. St. 68, n. *See* And. Dic.; Bouv. Dic.
CONSENSUS NON CONCUBITUS FACIT MATRIMONIUM: Consent, not coition, constitutes marriage. Bro. Max. 505-515; R. v. Millis; Van Houten; Van Voorhis; Brook; Manby; Seaton; Montague; De Benham; Jolly; Smout.
CONSENSUS TOLLIT ERROREM: The acquiescence of a party who might take advantage of an error obviates its effect. Bro. Max. 135-139; Max. No. 13, §§ 168-178, Hughes' Proc.; 8 Cyc. 331-333, 584. L.C. 290-299; *see* ABATEMENT; APPELLATE PROCEDURE.
Cognate maxims: *Communis error facit jus; Allegans contraria.*
Consensus facit legem: Consent makes the law; a contract in law between the parties having received their consent. *Communis error,* etc.
Illustrative cases: Windsor: 1 *et seq.;* Shutte v. Thompson: 291, *et seq.*
This maxim is intimately involved with the thirteenth conserving principle, namely: The policy to speed the disposition of causes upen their merits, also when to disregard dilatory or abatement matter. § 103, Gr. & Rud.
The principle is discussed in Campbell: 2; Shutte: 291; Munday: 79; Gentry: 88; Winona (the right of due process of law may be waived); L.C. 290-299.
Max. No. 13, §§ 168-178; pages 14, 16, 22; §§ 6, 8, 9, 11, 13, 17, 18, 23, 25, 29, 31, 38, 53, 72, 87, 113, 158, 179, 183, 185, 187, 298, 300, 303, 305, Hughes' Proc.; 8 Cyc. Pl. & Prac. 156-302.
Cited, §§ 46, 53, 55, 63, 103, 108, 147, 206, 227, 255, 271, 278, Gr. & Rud.
Importance of. *See* APPELLATE PROCEDURE; ABATEMENT; WAIVER; *Communis error,* etc.; Windsor: 1; Campbell v. Porter: 2.
Objections and assignments, if too general, will be disregarded. Sub Expressio unius, etc. Miller v. Dill: 290*b*. *See* ABANDONMENT; ASSIGNMENT OF ERROR; § 53 (Convenience).
"He who does not speak when he ought shall not be heard when he desires to speak." Bro. Max. 138; 8 Cyc. 331-333. This idea pervades all systems. WAIVER; ACQUIESCENCE; CONSENT.
One must speak and speak consistently at all times. 204 U. S. 647. It is also held that consent will give force to hearsay evidence. Schlemmer, 205 U. S. 1; L.C. 291-299.
Jurisdiction of a court of errors of waivable matter depends upon exceptions. Ins. Co.

Consensus.—
v. Folsom: 157; Apache County v. Barth (1900), 177 U. S. 538: cases; James v. S. (1899), 77 Miss. 370, 78 Am. St. 527; Marbury v. Madison: 142.
The limits of *Consensus*, etc., may be deduced from the doctrines of collateral attack, of motions in arrest of judgment and of *Non obstante veredicto;* §§ 83-123, Gr. & Rud.; and from the rule that the general demurrer searches the whole record and attaches to the first fault. Campbell v. Porter: 2. *Cf.* these views with Altman v. School District (1899), 35 Or. 85, 76 Am. St. 468, n. (a fatally defective complaint is not subject to collateral attack); Hume (Colo.).
Material allegations can not be waived. R. v. Waverton: 70; R. v. Waters: 71.
Limits of waiver. Dobson: 232*a*; Dovaston: 217. *Verba fortius.*
What may be waived; important distinctions. § 17, Hughes' Conts.; *Id quod nostrum*, etc.; *Jus publicum privatorum*, etc.; French v. Miller; Campbell v. Porter; Campbell v. Greer.
Pleas, answers and replications can be waived in Illinois. Hend. Eq. Pl. 521, 522 (the maxim cited and upheld to override all restraints and limitations).
The failure to make any objection to the collected jury waives objections to the improper exclusion of questions to individual jurors. Gatzow v. Buening (1900), 106 Wis. 1, 49 L. R. A. 475.
Failure to argue an assignment of error waives it. L.C. 186; Atlantic; APPELLATE PROCEDURE.
Failure to assign an error waives all objections and exceptions relating to it. See ASSIGNMENT OF ERRORS. *Limitations of consent.* P. 23, § 79, Hughes' Proc. *See* CONSTITUTIONALISM.
Failure to file a motion for a new trial waives all matter dependent thereon. L.C. 296: cases.
Consent to proceedings, when it estops. To a trial before tribunals not judicial. See Scott v. Avery: cases. To divorce proceedings. Karren (1902), 25 Utah, 87, 60 L. R. A. 294-308, ext. n.; Baily v. Baily, L.C. 44: cases. *See* CONSENT.
Contract for suit to be instituted in a certain jurisdiction, valid. See Mittenthal v. Mascagni (1903), 183 Mass. 19, 60 L. R. A. 812, n.
Validity of a statute can not be first raised in an appellate court. 195 Ill. 104. *See* L.C. 285; Wilmington Co., 205 U. S. 60.
CONSENT: Will not confer jurisdiction of a subject-matter. People's Bank: 12*d*; Shutte: 291; §§ 23, 26, Hughes' Proc.; §§ 56, 61 Gr. & Rud.; Weltmer v. Bishop. See *Consensus*, etc.; AIDER; WAIVER; ASSENT; Bailey, Jurisdic. 49, 50; Sedgk. Stat. 359.
Cited, §§ 56-61, 117, 144, 169, 225, Gr. & Rud.
Effect of in waiver, §§ 21, 304, Hughes' Proc. To crime. McClain, C. L. (*Volenti*, etc.).
Consent to surgical operation. Graham, 224 Ill. 300, 7 L. R. A. (N. S.) 609, n.
Whatever relates to the conserving principles of procedure is mandatory—imperative. These involve the whole public. *Salus populi suprema lex.* Two cannot contract to affect a third. *Res inter alios acta*, etc. *Consensus tollit errorem* has no application against these mandatory requirements of a constitutionalism. *See* CONSERVING

Consent.—
PRINCIPLES. §§ 3, 5, 49, 79, Hughes' Proc.
Consent can never confer jurisdiction upon a federal court. Minnesota, 194 U. S. 48-73.
Fundamental law depends upon certain ceremonies and requirements that can not be dispensed with. Windsor: 1; Oakley: 222; Campbell: 2; Campbell v. Greer: 2*a*; Sto. Pl. 10.
CONSERVATORS OF THE PEACE. Who are. *See* PRELIMINARY EXAMINATIONS; 1 Bish. Cr. Proc. 229. Mayor of a town is. Tillman v. Beard, *sub* Lange v. Benedict; 46 L. R. A. 215.
CONSERVING POLICIES. Are the mandatory requirements of a constitutionalism. §§ 56, 83-123, 267-268, Gr. & Rud.
Enumerated and defined. Chapter V, §§ 83-123, 239-256, *id.*
Support the supreme law of the land. §§ 83, 94, 216, 261, *id.*
Certainty is defined from. §§ 163-164, *id.*
Importance of. §§ 58, 112, 136-140, *id.*
Depend on implications—construction. §§ 105, 136-140, 146, 188, 207, *id.*
Procedure is developed from them as a center. §§ 146, 83-123, *id.*
Courts first consider and vindicate before they exercise discretion. §§ 96, 119, 125, 127, *id.;* Austin R. R. v. Cluck.
Courts vindicate in all cases alike. See CERTAINTY.
The law is not more regardful or tender in one case than another. §§ 83-123, Gr. & Rud. *See* CERTAINTY.
1. *Appellate procedure.* §§ 87, 216, *id.*
2. *Collateral attack.* §§ 89, 152, 187, 188, 201-205, 216, 220-225, 238, 252, 276, 313, *id.*
3. *Res adjudicata.* §§ 171-200, *id.*
Mandatory record supports. §§ 175, 188, 216, *id.*
4. *Due process of law.* §§ 92-95, *id.*
Depends on mandatory record. § 93, *id.*
Misunderstood. § 93, *id.*
Undefined in federal courts. § 93, *id.*
5. *Division of state power.* § 96, *id.*
Mandatory record requires. § 94, *id.*
6. *Removal of causes.* Requirements of. § 97, *id.*
7. *Comity of courts.* Requirements of. Certainty essential. §§ 98, 137, *id.*
8. *Justification defences depend on certain record matter.* §§ 99, 132, *id.*
9. *Election of remedies* must be evinced and determined from a certain record. § 99*a*, *id.*

Conserving.—
10. Public policy interests depend on the certain, fixed record. § 100, *id.*
11. Constructive notice likewise. § 101, *id.*
12. Construction makes or mars. §§ 102, 238, *id.*
13. Abatement or dilatory matter is waivable. §§ 103, 227, *id.*
14. The record rule: "What ought to be of record, etc." § 104, *id.* Codes support. §§ 134, 146, *id.*

CONSIDERATION: *Ex nudo pacto non oritur actio* (no cause of action arises from a bare agreement) together with the law of assent may be said to be the very heart and vitals of a contract. These may be expressly named as elements in the definition of contracts. No one element of contract has received more extended discussion than has that of the consideration. *See* L.C. 301-333 and others therewith cited. See also the maxim, *Ex nudo*, etc., cited, § 281, Gr. & Rud.

Only he who parts with something for a promise can ever be a wronged person thereunder. The maxim *Ex nudo*, etc., suggests this. For him, for the wronged person only, are courts created, consequently a consideration is indispensable to establish an *ex contractu* cause of action. A failure to allege and prove a consideration subjects the statement of the cause of action or of defence to objection upon general demurrer, motion in arrest and thereafter and forever to collateral attack.

The last statement discloses the interactions of contracts and of procedure, also that the substantive right depends upon a statement in the law of procedure that will pass the general demurrer. Accordingly, if the right is substantive, then the test of its existence, its force and effect is an adjective test. The words of the maxim, *Ex nudo pacto non oritur actio*, justify these observations, for it calls for a consideration of both substantive and adjective law, conceding for a moment that the supposed distinctions between those classes really exist. Both substantive and adjective law must be considered for a right comprehension of the profound maxim. When this is rightly understood then the "useless grists of profuse jargon" will clearly appear.

Consideration.—
Moral consideration insufficient. L.C. 316, 318; 39 Am. St. 731-746, ext. n. Past consideration, L.C. 301, 316. Illegal, *In pari*; Holman: 363; *Ex causa turpi.* Trust and confidence, Coggs: 350. Of barred debt, Trueman v. Fenton. Adequacy, L.C. 332, 333. Moving from a third person, L.C. 319. Unconscionable, Chesterfield. When presumed, L.C. 312. Partial failure, L.C. 308. A seal imports, L.C. 312; 9 Cyc. 297; Jackson v. Cleveland; ORAL EVIDENCE. Must be expressed, L.C. 335. Compromise a sufficient, Stapilton. Partial failure, 67 C. C. A. 171, 134 Fed. 1, 69 L. R. A. 232-246, ext. n. A promise for a promise is a sufficient, L.C. 321.
Illegal in part, effect. S. v. Wilson, 73 Kans. 343, 117 Am. St. 479-525, ext. n.
Generally: L.C. 301-333; *Ex nudo;* see works on CONTRACTS; 9 Cyc. 308-371; 7 Cyc. 690-751 (Commercial Paper); 1 Page, 270-324.

CONSOLIDATED COAL CO. v. PEERS (1896), 166 Ill. 361, 38 L. R. A. 526. *Res adjudicata* must be pleaded. Wright v. Griffey: L.C. 28. *See* ILLINOIS (pleadings may be waived).

CONSOLIDATION OF ACTIONS: Logan v. Mechanics Bank (1853), 12 Ga. 201, 58 Am. Dec. 507, ext. n.; 4 Encyc. Pl. & Pr. 673-705; Bouv. Dic.; § 140, Hughes' Proc.; 8 Cyc. 589-614.
Permissible at common law. Brc. Max. 346; 58 Am. Dec. 507; Bullard, 66 Vt. 599, 44 Am. St. 867, n., 25 L. R. A. 605. Founded on convenience, § 53 Gr. & Rud.

CONSPIRACY: U. S. v. Cassidy (1895), 67 Fed. 698-783 (general *resume*); *Spies v. P.* (Anarchist Case); *Hutchins v. Hutchins* (1845), 7 Hill 104, Bigl. L. C. Torts, 207-216, n.; Ames, Cases, 661; *P. v. Richards* (1849), 1 Mich. 216, 51 Am. Dec. 75-94, ext. n.; *C. v. Hunt* (1842), 4 Met. 111, 38 Am. Dec. 346; *Cote v. Murphy* (1894), 159 Pa. 420, 39 Am. St. 686, 23 L. R. A. 135, n.; *Drake v. Stewart* (1896), 76 Fed. 140; *Tucker v. Hyatt* (1898), 151 Ind. 322, 44 L. R. A. 129; 3 Gr. Ev. 89-99, 2 Bish. C. L. 169-340, 2 Bish. Cr. Proc. 202-245; Bouv.; And. Dic.; McClain, C. L. 952-990 (procedure); 10 Am. Cr. Rep. 240, 241; 4 Encyc. Pl. & Prac. 706-740; 8 Cyc. 615-694.
Enticing one to break a contract is actionable. Extended discussions of contract and of tort. Allen v. Flood; Lumley; Lynch; Ashby: 273: cases. *See* MALICIOUS ACTS.
Conspiracy to deprive one of his civil rights. §§ 1979-1981, R. S. U. S.; 3 Gr. Ev. 90. *See* CIVIL RIGHTS.
To impede the due course of justice or to injure any litigant. §§ 1979, 1980, R. S. U. S.; *Tryon v. Pingree* (1897), 112 Mich. 338, 67 Am. St. 399, n.; 3 Gr. Ev. 90.
Boycotts; strikes; pools; trusts. Cooke on Labor Comb.; Allen; Lumley; Plany v. Woods (1900), 176 Mass. 492, 79 Am. St. 330, n.; West Va. Co. v. Standard Oil Co. (1900), 50 W. Va. 67, 56 L. R. A. 804, n.; 7 Am. Crim. Rep. 150; 10 *id.* 227, 240, 241. *See* BOYCOTTS.
Conspiracy defined; essentials of indictment; the means and particulars must be set out and proved. Cruikshank: 232; R. v. Wheatley: 19; Pettibone v. U. S. (1893), 148 U. S. 197; U. S. v. Cassidy; C. v. Eastman: 22; C. v. Hunt; Boutwell v. Mara (1899), 71 Vt. 1, 76 Am. St. 746.
Combination is proved inductively by res gestæ facts. Drake v. Stewart; U. S. v. Cassidy; Spies v. P. Declarations of one;

Conspiracy.—
when they bind all. U. S. v. Gooding: 202; 7 Am. Cr. Rep. 149, 150, 443.
Proof of; what sufficient. Hutchins; P. v. Woods, 147 Calif. 265, 109 Am. St. 151, n.; 77 Vt. 294, 107 Am. St. 765-790, n.
Strike and strikes. Note, 79 Am. St. 343.
Seances; false pretenses; combination to cheat by, is indictable, although no one is deceived. P. v. Gilman (1899), 121 Mich. 187, 80 Am. St. 490.
CONSTABLE: Bouv. Dic. May appoint deputies. Taylor v. Brown.
CONSTITUTIONALISM: The division of state power is the first great basic principle of. §§ 56-59, 237-240, Gr. &, Rud.; Dennett; Flournoy: 146; Burton.
Fundamental conceptions of. §§ 17, 18, 107, 118, 128, 136, 147, 208, 239-256, Gr. & Rud.
Essentials of. §§ 111, 112, 115-123, 137-170, 256, Gr. & Rud.
Depends on a record. §§ 56-61, 96, 115-119, 136, 137, 201-205, 208, 238-256, Gr. & Rud.
Also construction: In præsentia majoris, etc.; *Cujus est instituere ejus est abrogare.* Hughes' Proc., pp. 1-43; §§ 1-50. Virginia Coupon Cases: 285*a*; Haddock.
Requirements of, cannot be waived. §§ 46, 60-61, 136-147, 163, 204, 292, Gr. & Rud. Campbell v. Greer: 2*a*.
Statutes cannot deny means of. §§ 137, 163, Gr. & Rud.
A study of procedure is a study of government. Blake v. McClung; Cruikshank: 232. §§ 118, 123, 134-163, 170, 204, 207, 238-256, 83-123, Gr. & Rud.
A government conducted, limited and bound in the exercise of its powers, by stated and fixed principles. An absolutism is its opposite. The latter prescribes no mandatory record, no certain and known foundation for judgments and sequestration orders, nor has regard for the rule that courts are bound by their records, or the defensive means of the general demurrer, motion in arrest of judgment, collateral attack, *habeas corpus,* or respect for the maxims, *De non apparentibus,* and *Actore non probante.*
Perception of the rationale of the general demurrer, and its affinities, discloses the relationship of government and procedure.
The tests of an adjudication involve an intimate knowledge of the scheme and polity of government. *See* DUE PROCESS OF LAW; *Coram judice; Audi alteram partem;* §§ 51-77, Hughes' Proc.
The requirements of a constitutionalism are silent factors of the law, which are imported and applied by construction. The obligation of courts under a constitution is to adjudicate the matters presented to them by their records according to established rules of procedure. Austin R. R., *sub* DEPARTURE; *see* CERTAINTY; *Expressio eorum,* etc.
CONSTITUTIONAL LAW: Is there an unwritten constitution? §§ 83-123, Gr. & Rud.; HIGHER LAW; Preface; §§ 5, 12, 17, 48, 72-78, 80, 106, 111, 112, 115-120, 123, 137-140, 136, 138, 262, 265, *id.*
Supreme law of the land construed by the civil law. §§ 79, 211, *id.;* HIGHER LAW; *Lex non exacte definit,* etc.; §§ 78, 115-120, 139, 163, 211, *id.;* Hughes' Proc. 204.
General *resume.* § 262-268, Gr. & Rud.: Maxims and cases.
Constitutional Law: IMPORTANT OBSERVATIONS. The student of constitutional law will be greatly advanced by an investigation of these leading questions:
1. Is there a prescriptive constitution? See §§ 45-71 Grounds and Rudiments.
2. Must not the construction of judicial means be governed by the conserving principles of procedure? §§ 83-123 Grounds and Rudiments.
3. Is the rule of statutory construction tenable, that a statute is constitutional unless it is opposed to express words which must be precisely expressed and defined? Rison v. Farr: 253; Blair v. Ridgley: 254; Brown v. Tharpe; Henrico Co. v. City of Richmond, 106 Va. 282, 117 Am. St. 1001. *See* Trist: 214: cases.
4. The separating line between a constitutionalism and an absolutism? See Preface, Grounds and Rudiments.
5. The office and functions of the mandatory record. §§ 83-123 Grounds and Rudiments.
6. Are the fundamental maxims of the civil law the rules of constitutional construction?
Constitutional Law should be read in connection with the grounds and rudiments of law, construction, certainty, codes, collateral attack and the other conserving principles of procedure. All of these reflect constitutional law. All depend on certainty and construction, and the latter tests every matter from a constitution, which includes the leading matters above mentioned. This view is from the standpoint that there is an unwritten constitution in America as in England. This is a leading question in America.[1] The distinction between the liberal constructionist and the one who recognizes the existence of an unwritten constitution is but verbal.[2] The latter is made up of maxims, precedents and customs. If these are interpreted into a constitution they are just the same as if there.[3]
Treaties, international law, equity and admiralty have brought with these canons of the civil law. These are the "metwand" of the *common* law. By these constitutions, treaties, leagues, compacts and truces are construed.

1—*See* CONSTRUCTION; PRESCRIPTIVE CONSTITUTION.
2—*See* CONSTRUCTION.
3—S. *ex rel.* Henson v. Sheppard.

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Importations from the civil law, figuratively speaking, are a great powerful and constantly widening wedge driven into the common law of the middle ages. The *status quo* of all its subjects has been riven or remolded by the imported influences, and writers who do not know or take into account the effects of that wedge cannot make congruity and a philosophy of law.

Morality, Christianity, religion, procedure, the police power and other subjects enlarge, contract or nullify statutes exactly as do express constitutional provisions.[4] Constitutions are likewise affected. To these propositions it must be admitted that things equal to the same thing are equal to each other.

The federal courts and most of the states construe words and compacts by the same rules as the English courts. The latter have the unwritten constitution but it affords no different rules of construction than those from the civil law. Wherever these are rightly applied the results are the same.

Constructionists must take the foregoing facts into account if they would avoid narrow and mischievous views. It should be perceived that an explication of the conserving principles of procedure also unfolds constitutional law and construction, and that the study of procedure is a study of government.[5]

The first great principle of a constitutionalism, namely, the division of state power, has been more shaken in one hundred years than has been the command "ye cannot serve God and mammon," as it is applied, in *Keech, Michoud, Dimes, Oakley, S. ex rel. Henson v. Sheppard.*

The division of state power is more than shaken for it is shattered where the clerk is construed out of the scheme; where pleadings and the mandatory record are waived; where the statutory record is substituted for the foundation of a judgment; where this foundation is picked out of anything and found from anywhere or nowhere as it is where it is declared to exist from irrelevant and contemptuous argument, as it has been in some courts.

4—Church of The Holy Trinity v. U. S.: Trist v. Child: 214; P. v. Turner: 252; P. v. Town of Salem; Oakley v. Aspinwall: 222.

5—Cruikshank: 232; Blake v. McClung.

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Such courts do not understand the mystic rules and this one especially: What is not juridically presented cannot be judicially considered.[6]

Many decisions can be cited to the point that to what extent a record is necessary in judicial procedure—if indeed it is necessary at all—depends on the last decision of some benighted and bewildered court. This is the result of teaching that all not expressly provided for in a constitution are waived or denounced at any time by courts or legislatures, or those who do not comprehend the record or the constitutional rule.[7] To know this rule enables one to perceive that the requirement that one must recover *secundum allegata et probata* is a constitutional principle whether expressed or not. Any different rule would be destructive of jurisprudence and of protection. This rule is all that separates a constitutionalism from an absolutism. If courts could disregard it, then they could dispense with their records, and where they can do that there courts are not bound by their records.

Construction and the due administration of the laws are the leading questions in constitutional law. From these discussions constitutional law can be well presented, *e. g., Expressio unius est exclusio alterius* is a ground and rudiment of law.[8] It is a fundamental rule of construction,[9] a rule of logic.[10] In constitutional law it has paraphrases and generally this, where a constitution provides an express way there is no other implied. Now this is constitutional law,[11] and is one of its most important rules.

The supreme law of the land: The due administration of the laws comprises a greater part of constitutional law. Therefore that law and its relations should be thoroughly comprehended. It may well be introduced and viewed from procedure

6—*De non apparentibus et non existentibus eadem est ratio; see* CODES; CERTAINTY; CONSTRUCTION; CONCLUSIONS OF LAW; Unger v. Mellinger, 37 Ind. Ap. 639, 117 Am. St. 348 (an answer may be waived).

7—*See* CONSTRUCTION; CODES.

8—8 Cyc. 695-805; §§ 267-268, Gr. & Rud.

9—19 Cyc. 23-29, Hughes' Proc.; §§ 186-203, also Text-Index *id.*

10—19 Cyc. 23-29: cases.

11—Marbury v. Madison: 142; 115 Ill. 165; 91 Ill. 124.

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and its affinities, construction and certainty. A ground and rudiment of law is the mandatory requirements of a constitutionalism and these cannot be waived.[12] For a presentation of these views the conserving principles of procedure must be reviewed.[13]

Due process of law is a part of the supreme law of the land. What it is depends on the construction of the federal supreme court, the decisions of which will not allow us to say that what is due process of law is a well settled subject. The opinions of that court greatly fluctuate.[14]

Remedies for injuries. Ubi jus ibi remedium. Ashby: 273; Edwards: 286; Hanson v. Krehbiel, 68 Kans. 670, 104 Am. St. 422 (Statute cannot destroy).

Division of state power. Expressio unius est exclusio alterius. Dennett: 145; Flournoy: 146; 8 Cyc. 806-862.

Arbitrary power excluded. Noel, 187 Ill. 587, 79 Am. St. 238. Executives are limited. Milligan's Case. Legislatures are limited. Marbury v. Madison: 142; and courts are bound by their records.

Police power. Salus populi suprema lex; Sic utere tuo, etc.; 8 Cyc. 863-874.

Executive power. Garland: 60; 4 Wall. 333; Neagle's Case: 248; Debs, *In re;* Moyer, 117 Am. St. 189.

Martial law. Milligan's Case; Boyle, 6 Ida. 609, 91 Am. St. 286, 45 L. R. A. 537; Moyer, 35 Colo. 159, 117 Am. St. 189.

Construction is a leading question. See CONSTRUCTION; also various titles. 8 Cyc. 695-805.

Implications or incidents are fully annexed. M'Culloch: 147; S. v. Townley: 225*a*; C. v. Hess: 215; Church.

The mandatory record is an implication. Windsor: 1; Galpin: 63.

Its requirements arise from an unwritten constitution. Oakley: 222; Dimes: 176; 17 Utah, 412; 70 Am. St. 794; Murray: 219; Galpin: 64; S. v. Baughman: 268 (meaning of, according to the course of the common law); McKinster v. Sager (1904), 163 Ind. 671, 106 Am. St. 268-281 (due process of law means law of the land, etc.).

Frustra probatur quod probatum non relevat (it is vain to prove what is not alleged) is profoundly constitutional.[15] A cause of action must be stated or there is no power to receive evidence. This power is ever in question.[16] Its exercise depends on a cause of action stated. Pleadings are the juridical means of investing a court with jurisdiction of

12—§§ 56-61, Gr. & Rud.; Windsor: 1.

13—§§ 83-123, Gr. & Rud..

14—Howard v. Fleming; Windsor: 1; McKinster (Ind.), *supra;* Taylor, 178 U. S. 548-609 (discusses XIV Amendment); *Audi alteram partem,* Hughes' Proc. 51-86; 8 Cyc. 1080-1136.

15—Cruikshank: 232.

16—Slacum; Bowman v. P.; McAllister: 3

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a subject-matter to adjudicate it. Enough can be picked out of constitutions to show the high command for a clerk, his record and how jurisdiction is attracted, invested and exercised. To an express enumeration there applies *Expressio unius est exclusio alterius.*[17] Where constitutions have provided an express way no other can be implied.[18] So there must be the division of state power, the record, the pleading and it must state something upon which the court can act. To all this applies, what is not juridically presented cannot be judicially considered.[19] Consequently the commonplace, nevertheless constitutional, rule is, consent cannot confer jurisdiction of subject-matter.[20] The ground and rudiment that the mandatory matters of a constitutionalism cannot be waived is pregnant with meaning.[21]

Where courts can waive and dispense with records there they can act out of and beyond the law; such action is outlawry.

A great government of protection must afford it and give equal and uniform law; for this there must be stare decisis. For this equal respect must be shown all fixed and reasonable laws which accord with fundamental requirements. These views are at variance with the idea that all the high and fixed law there is is that incorporated in a constitution.

The laws of public policy, of the police power, of necessity, of morals, reason and convenience are all laws of the greatest dignity; none is higher or deserving of more respect. This proposition is easily sustained from English decisions, afterward it only remains to show the difference between English and American cases. This phase has already been mentioned.

In this connection it may be well to observe that the great cases of certainty and of construction may be viewed as constitutional cases. Of such are *M'Culloch, Marbury, Gibbons, Barron, Cruikshank, South Carolina v. U. S.* and *Church, etc.,*

17—19 Cyc. 23-29.

18—Marbury: 142; Lane; Dennett: 145.

19—*De non apparentibus,* etc.; Cruikshank: 232.

20—§§ 56-60, Gr. & Rud.; *Quod ab initio,* etc.; Shutte v. Thompson: 291; ALLEGATIONS.

21—§ 56, Gr. & Rud.

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v. U. S. And so are many of the notable cases with which procedure is illustrated. These facts tend to support the view that constitutional law is learned from the grounds and rudiments of law and the conserving principles of procedure.

Statutes cannot prescribe for courts rules of construction (*see* CODES), *nor what is a sufficient pleading,*[22] *nor conclusive evidence.*[23]

Statutes contrary to fundamental law void. Indianapolis: 223; Dash v. Van Kleeck: 237*a*; S. *v.* Townley: 225*a*; Bates *v.* Bulkley: 225. *Contra,* Brown v. Tharpe.

The confusion of the authorities as to the necessity of stating a cause of action may be judged from matter cited in the note.[24]

The mandatory requirements of procedure are constitutional;[25] *they are also grounds and rudiments of law.*[26]

The importance of the maxims last cited proves they are grounds and rudiments of law. Imagine the reverse of what they express and what remains of law.

Procedure is constitutional, and especially what relates to stating a cause of action;[27] or jurisdiction of parties;[28] or respecting fundamental principles;[29] and the limitations of judicial power.[30]

Stating a cause of action involves the basic rules, namely, the record or constitutional, the mystic and the coram judice.[31] All of these are roughly included in the rule, "What is not juridically presented cannot be judicially considered,"[32] or in other words, *Expressio unius est exclusio alterius.*

22—Huntsman v. S.: 231; Murray v. Hoboken: 219; S. v. Beach: 258.

23—S. v. Thomas: 257; Phelps v. Racey: 191.

24—2 Cyc. 689-691; 2 Thomp. Tri. 2310, 2311 (pleadings can be waived like any other notice); 1 Gr. Ev., note, 16th ed. (variance immaterial under codes); And. Steph. Pl. 230, n., 2d ed.; Hume; AIDER; CONCLUSION OF LAW; *Contra:* Reasons stated, Hughes' Proc. pp. 8-14.

25—Austin R. R.; R. v. Solomon; Cruikshank: 232.

26—§ 56, Gr. & Rud.

27—Rushton: 5; Campbell v. Porter: 2; Murray: 219; Cruikshank: 232; Slacum; Bartlett: 6; Williams v. Hingham: 7.

28—Pennoyer: 58; *see* AMBASSADORS.

29—Windsor; Oakley: 222; Dash: 237*a*.

30—Windsor: 1; Dimes: 176; S. v. Shepherd (Contempts); Hale v. S. (Contempts).

31—*See* CODES; CONSTRUCTION; CERTAINTY.

32—*De non apparentibus,* etc.; *Audi alteram partem.*

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One must make a record and at his peril in a constitutionalism. He must state something that can be gathered from the right record. Otherwise nothing is adjudicated; nothing was juridically presented.[33] These grounds and rudiments of law must be well comprehended and clearly perceived. These are acorns from which spring the giant oaks. Construction is the sap. The intention and the reason influence construction throughout all subjects.[34]

Obligation of contracts. Bronson; 8 Cyc. 929-1017.

Civil, personal, political rights. *See* LIBERTY; LIBERTY OF SPEECH AND OF THE PRESS; CIVIL RIGHTS; 8 Cyc. 877-894.

Privileges or immunities and class legislation. Bartemeyer; Millett; 8 Cyc. 1036, 1056.

Practical construction. See *id.;* Maher v. S.

Specific provision violated must be pointed out. 8 Cyc. 800-801.

Objection of unconstitutionality must be raised in court a quo. 8 Cyc. 800; Hill v. Tarver, 130 Ala. 592; Winona; Osborn v. Clark, 204 U. S. 565.

Cases that go from the highest court of a state to the federal supreme court for review are governed with a strictness and singularity as to how the grounds for review shall be presented and reserved. Under that practice it is difficult to see how the mandatory record may remove enough for reversal without reference to the statutory record as in *Windsor v. McVeigh.* (*See* FEDERAL QUESTION.)

Local option laws. Chicago, 223 Ill. 104, 114 Am. St. 313-325.

Equal protection of the laws. *See* CIVIL RIGHTS; 8 Cyc. 1058-1079.

Limitations of legislative authority. Bartemeyer; Taylor v. Porter (Property); Ruhstrat v. P., *sub* POLICE POWER; Arbuckle v. Blackburn, 51 C. C. A. 122, 113 Fed. 616, 65 L. R. A. 864-873: cases; Millett v. P.; S. v. Brown, 37 Wash. 97, 107 Am. St. 798, n.; 186 Mass. 376, 104 Am. St. 590, n.

States are only limited by the federal constitution. Coffey v. County, 204 U. S. 659.

Property; interference with. Sic utere, etc.: *Salus,* etc.; Taylor v. Porter: 219*a*; Allen v. Jay.

Prisoner's right to speedy trial. Begerow, 133 Cal. 349, 85 Am. St. 178-204, ext. n., 56 L. R. A. 513-545, ext. n.

Ex post facto; retroactive laws. Calder: 237; League v. Texas, 184 U. S. 157 (new remedies may be afforced); but *see,* Terre Haute R. R. v. Ind., 194 U. S. 579 (strict construction of power of state to enforce its rights); Howard v. Fleming; Hanford v. Davies: 86; 8 Cyc. 1017-1036.

The construction of a state statute is a local concern, and will not be disturbed by federal courts. Whether or not a state statute conforms to the state constitution is a question for the state court. Smith v. Jennings (1907), 206 U. S. 276.

Self executing provisions. Winchester v.

33—*Expressio unius,* etc.; *Ignorantia legis neminem excusat.*

34—*Verba intentione,* etc.; 8 Cyc. 695-805; South Carolina v. U. S.

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Howard (1902), 136 Cal. 432, 89 Am. St. 153, n.; 8 Cyc. 752-756.
Waiver of. Kelly: 285; Winona; 8 Cyc. 791-796; Work v. S. (jury); Turney; Shepard v. Barron, 194 U. S. 553 (estoppel).
Vested rights. Bronson: 238; Taylor v. Porter: 219*a*; 8 Cyc. 894-929.
Any court may declare a statute void. Lane v. Dorman; Marbury; 8 Cyc. 797.
Unconstitutional acts are void. Kelly: 285; Royall: 284; Windsor: 1; *see* CORAM JUDICE.
Generally. Hughes' Proc.; 8 Cyc. 695-1145.
Commerce; interstate; state laws cannot regulate nor interfere with. Adams Express Co. v. Ky. (1907), 206 U. S. 129: cases.
CONSTITUTIONAL PROCEDURE: Mandatory record an implication. §§ 83-123, 136-140, 263, 237-256, 311, Gr. & Rud. *See* CONSTITUTIONALISM.
For it construction molds, warps and bends. End. Stat. 182; §§ 84, 85-90, 111, 136-140, 262, Gr. & Rud.
Constitutions provide for procedure. §§ 152, 206-209, 237-256, 264, Gr. & Rud. *See* Indianapolis: 223; Oakley: 222; Dimes: 176; Dash: 237*a*.
CONSTRUCTION: A conserving policy. §§ 102, 123, 240, 297, Gr. & Rud.
Two schools. §§ 6, 187, 188, 231, 234, 238, 297, Gr. & Rud. *Lex non exacte,* etc.
Its rules are civil law maxims. See CIVIL LAW; MAXIMS; §§ 20, 34, 77, 134, 139, 211-212, 260, 262, 297, Gr. & Rud.
The "golden metwand of the common law" means the civil law. §§ 79, 136-140, 159, 234, 297, Gr. & Rud.
It makes or mars. §§ 20, 52, 58, 78, 79, 102-123, 136-140, 147, 187-188, 231, Gr. & Rud.
Codes perverted by. §§ 194, 220-230, 234, 240, 260, 297, Gr. & Rud.
Strict. See *Ita lex scripta est.* §§ 6, 33, 118, 231, 297, Gr. & Rud.; Dewey; Burks: 217*a*; James v. Bowman: 233; Planing Mill Co.: 2*d*.
Limits of liberal. §§ 231, 234, Gr. & Rud.; South Carolina; Hawaii; Bates: 225; S. v. Townley: 225*a*. AIDER; Dobson: 232*a*.
Liberal. §§ 33, 118, 136-140, Gr. & Rud.
This has developed federal power. Genesee Chief; M'Culloch: 147. § 81, Gr. & Rud.
Liberal cannot supply omitted allegations. §§ 104, 119, Gr. & Rud.; Davenport: 2*f*; Cruikshank: 232; Dobson: 232*a*.
The unwritten constitution an implication. §§ 83-96, 115-123, 146, 188, 192-193, 211-212, 234, 260, 297, Gr. & Rud.
Fundamental maxims: Verba fortius, etc. (Dovaston: 217); *Expressio eorum,* etc. (M'Culloch: 147); *Expressio unius,* etc. (Marbury: 142).
Imports fundamental principles in codes and practice acts. §§ 134-153, 159, 188, 260, 297, Gr. & Rud.
Res adjudicata requirements protected by. Bates: 225; §§ 188, 191, Gr. & Rud.
Implications. Bates; S. v. Townley, etc.; Burton; Cherry; Sexton; §§ 188, 206-212, 234, Gr. & Rud.; *Lex non exacte definit.*

Construction is a leading branch of the law. It is inseparably interwoven with procedure, equity, contract, crime and tort. To impress a necessary view it is stated that Procedure is the leading branch of the law depending on construction and the leading question of the latter in America in this age is, is there an unwritten constitution. If there is it should be known, defined and expressly recognized, for if it exists it lies at the base of the law, and to ignore or disregard it will intensify a condition that is proving a hidden rock upon which the harmony and symmetry of our jurisprudence is wrecked. It must be admitted that it is hopelessly and deplorably drifting, lightning-struck and storm-driven, without anchor, star or compass. The situation justifies the following quotation:

"All systems of procedure are developed from the maxims. Recoining the old matter in a new language does not change that matter.

"Looking from basic principles will show why the eight jurisdictions in or adjacent to Illinois view each other with more than derision. The admiralty distrusts states' jurisprudences. The federal is unknown to most state practitioners. Indiana looks over into Illinois with aversion and *vice versa,* and so on around to and including Wisconsin. Vain are local claims to be precisely correct because Blackstone and Chitty are closely followed. Adjacent interlacing and intermixing jurisdictions are not convinced, and are no longer patiently looking or listening or considering. They are tired and discouraged. They are independent. They do as they please. They profess to follow reason, but they are widely apart and very unlike. The lawyers see that each tribe and court has its own laws, and often that each case is a law unto itself; that little respect is shown *stare decisis,* possibly because it is a maxim. All admit the condition is bad and is becoming worse. (*See* 8 Columbia Law Rev. 172-182.)

"It is said by many that maxims—the 'condensed good sense of nations'—are no longer the law, and that there is something new and different, still they claim that their locality has most nearly the proper thing.

"As it is with Illinois, so it is with New York, Pennsylvania and Massachusetts.

"Their hundreds of volumes speak the language of Babel. They say all things to all men." (1)

In accordance with the foregoing classification and observations it seems proper to add that constitutional law is practically presented from procedure, from its conserving policies, the right elucidation of which depends on construction. From these viewpoints it is the purpose to show the all-important fact that the unwritten constitution of England is likewise the same superior dominating and influencing law in America; that it is as much the "metwand" of construction as are those maxims and general principles

1—"Maxims as a Means of Legal Instruction," 33 Chicago Legal News (1906), p. 260.

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expressly reaffirmed or declared in written constitutions. Great charters, the common and the civil law of Rome have much to do with construction, which if not taken into account and rightly comprehended will prove a stumbling block if not a morass of pitfalls and delusions. From superior laws the constructionist must look and reason; he must ever keep them in view and deduce from them.

The maxims of the civil law are practically the unwritten constitution not only of England but of America as well. Were this not so there would be myriads of differentiating cases from England which cannot be inventoried. In some American states where pleadings are waived, where the *coram non judice* proceeding is construed valid from laches or waiver, where the foundation of a judgment is picked and construed from the statutory record, or forensic argument, or conduct not of record there are greater differences in basic principles than there are between the decisions of England and the federal courts. Many cases can be cited to sustain this proposition. From this the influence of construction to make or mar will appear.[2]

The rules of construction are interactions. Therefore to understand them the subjects from which they emanate must be known. Its rules have come with the importation and establishment of important subjects such as equity, admiralty, international law, the law of descents and distributions, commercial paper and the conserving principles of procedure such as *res adjudicata* and the other estoppels, constructive notice and due process of law.

The condition should be made plain, therefore to illustrate, it is observed that the subject may be the simplest form of contract, namely, the marriage contract, where no more is involved than this, a promise for a promise, and what are annexed as incidents by construction, or the contract may be in writing, and thus: "I. O. U. $100.00 (Signed) 1.2.8." (See COMMERCIAL PAPER.) Or this contract may be endorsed thus "Without recourse on me." (Signed) Or it may be a

2—Breeze; Rensberger; Russell; Hume (Colo.): cases; Unger v. Mellinger, 37 Ind. Ap. 639, 117 Am. St. 348 (an answer can be waived). §§ 114-123, Gr. & Rud.

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railway ticket which carries with it vast implications like the marriage contract. Or it may be a deed or a specialty with all its distinctive and singular rules of exclusiveness, non-negotiability and strictness of estoppel and presumptions of consideration. Or it may be a judgment which includes by construction the record upon which it is founded and especially in cases of proving title or an estoppel founded thereon.

In the above are illustrations from the various classes of contracts, which include the simple contract, which may be oral or written, the deed and the judgment. All of these classes have their distinctive rules of construction, also of evidence. The judgment has most to do with the record or constitutional rule which requires the record. Simple contracts have most to do with the oral or parol rule of evidence. These rules of evidence are inseparably connected with construction. Or a will which involves the law of descents and distributions which is from the civil law of Rome. Or a treaty or league or truce or international compact may be involved and here we have international law and its canons of construction. It is also from the civil law. Or it may be ordinance of a municipal corporation, like that of Washington City as in *Cohens v. Virginia:* 244. Or a statute like an act of Congress *(Church v. U. S.).* Or a constitution *(M'Culloch v. Maryland:* 147; *Barron v. Baltimore:* 241; *Marbury v. Madison:* 142; *South Carolina v. U. S.)*

We have mentioned the judgment, one of the classes of contracts. In all cases it involves the mandatory record, a part of which are the pleadings (Clem). This record throughout is construed from the record rule "what ought to be of record must be proved by record and by the right record" *(Planing Mill Co. v. Chicago),* also the rule, "every presumption is against a pleader" *(Verba fortius accipiuntur contra proferentem),* also the rule, "a court is bound by its record."

The grounds and rudiments of law and the conserving principles of procedure interweave and interlace, expanding here and contracting there as may be necessary to harmonize, unify and accord with rea-

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son. *Concordare leges legibus est optimus interpretandi modus.* End. Stat. 182.

The relations of the foregoing subjects to the whole body of the law must be comprehended, also their dependence upon the fundamental rules of construction, which apply to all subjects. These rules are the "metwand" of the common law and must be familiar to all constructionists.

The grounds and rudiments of law often appear as rules of construction, and these same rules as rules of pleading or evidence. From such facts the law appears as an entirety. Its parts act and react upon each other.

Construction must be studied from the grounds and rudiments. These and the conserving principles of procedure pervade all parts of the law. The constructionist must clearly perceive this fact and always respect it. *Concordare leges legibus est optimus interpretandi modus* (to make laws agree with laws is the best mode of interpreting them) is a maxim ever to be regarded. Therefore for consideration ever attends the question which is the higher and dominating law. In American states all must agree that the "supreme law of the land" (Art. VI, Const.) is the highest law. This enumerates the constitution and laws made in pursuance thereof and treaties. The enumerations are sweeping clauses, and the rule is, that to such clauses other laws annex themselves by implication. Constitutions cannot incorporate codes and minute details and fundamental rules of construction. This is a fundamental rule of construction *(M'Culloch v. Maryland; Strauder v. West Virginia; Cohens v. Virginia), Expressio eorum quæ tacite insunt nihil operatur.* To illustrate, treaties will be mentioned. These belong to international law. The law of ambassadors, consuls, leagues, compacts and truces are from the civil law. Of it Grotius is the authority. He intended his writings should be construed and applied according to the civil law. Accordingly its maxims and canons of construction are sought in construing international law. Bearing in mind all parts of the "supreme law of the land" are construed by the same rules, it

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appears that the civil law maxims are accorded a high and dominating position in construction. But strict or literal or grammatical constructionists deny the foregoing deductions. They constue strictly and point out and stand upon the strict letter. *Ita lex scripta est* is their rule. They strictly apply *Expressio unius est exclusio alterius.*

The question of whether construction shall be literal and strict or comprehensive and liberal is the parting of the ways. Therefrom arise two schools of constructionists. Their contentions appear from very recent cases.[2a]

Liberal constructionists view the great canons of construction as an unwritten constitution. Practically this must be conceded. And to support this proposition it has only to be remembered that Acts of Parliament are construed by an *unwritten* constitution while American statutes are governed by *written constitutions.* Who will contend that treaties are construed differently in England and in America? Each country simply imports or rejects as the grounds and rudiments of law may dictate. The cases already cited, also *Dash, Oakley:* 222, *Trist v. Child:* 214, *P. v. Town of Salem* and *P. v. Turner:* 252, may be cited to show that the results of construction are practically the same in both countries. It is clear that the grounds and rudiments, also the conserving principles of procedure, are the same. If these are the "metwand" of construction then the results must be the same. These are the same matters in each country. Things equal to the same thing are equal to each other.[3]

Further to illustrate, take the element of morality or Christianity, or religion, which is mentioned as a ground and rudiment of law, and note its influence in *Church v. U. S.* also in *Trist.* Now, in the face of such decisions, who can say that morality is not respected by construction in America exactly as it is in England? But in the latter country it is a part of the unwritten constitution; but it has exactly the

2*a*—South Carolina v. U. S.; Church v. U. S. (1892); cases; Burks v. Bosso (N. Y.); Indianapolis R. R. v. Horst (U. S.); C. v. Hess (Pa.); Aller v. Aller (N. J.).

3—See *Audi alteram partem;* Andrews v. Andrews.

same influence in America. From this view it appears quite immaterial from the decisions of liberal constructionists whether we have an unwritten constitution or its periphrasis, liberal construction. The latter school apply the unwritten constitution of England. Consequently there is an unwritten constitution in the United States in those decisions resting on liberal construction. These proceed from the grounds and rudiments of law and upon what they depend.

Christianity is a part of the law of Rome and England; it is a part of their unwritten constitutions. Now, is it otherwise in America? Are not the defences resting on *In pari delicto potior est conditio defendentis* the same in all countries? Are not contracts judged by the same standard of morality in all these countries? American courts follow *Holman v. Johnson:* 363: cases; *Beaumont v. Reeve* and *Pearce v. Brooks*, and such cases. Broom's third maxim is *Summa ratio est quæ pro religione facit* (where the laws of God and of man conflict the former shall be preferred). Now, from the cases cited is it not the law of all countries? If it is a part of the unwritten constitution of England is it less in America?

Have we an unwritten constitution in America, has long been a leading question. To determine that question it must be viewed from such viewpoints as are above afforded. They involve the maxim, *Lex non exacte definit sed arbitrio boni viri permittit:* The law does not define exactly, but trusts in the judgment of a good man. If a subject-matter is construed the same under a written constitution as it is under an unwritten one then this is a fact of far reaching consequence. Whether such be the fact or not will depend on the cases. If these are unlike they can be shown.

Fundamental principles of law annex themselves in construction. Cases are cited above showing this fact. The common law expands or contracts the language of all compacts. This is well illustrated by the cases on construction. These should be carefully considered and therefrom the reader should conclude whether or not there are any real differences in construing in America and in

England. Unless there are such differences then America has an unwritten constitution just as much as England. If fundamental principles expand, contract or nullify statutes by liberal construction,[4] then these have the same effect as a constitution, no more and no less. Things equal to the same thing are equal to each other.

The grounds and rudiments of law are the "metwand" of construction. Briefly, these are the dominancy of superior laws *(In præsentia majoris cessat potentia minoris)*, every man is presumed to know the law *(Ignorantia legis neminem excusat)*, *Salus populi suprema lex*, the law of necessity, of religion or morals already mentioned, the law of convenience, reason, consent and acquiescence, mandatory matters of a constitutionalism, the necessity for remedies, the exclusion of fraud and vindication of the just, equitable and *bona fide* and denying one any benefits from his own wrongdoing. These are elsewhere more fully expressed. These interweave or interlace with the conserving principles of procedure. From these matters the entire law can be articulated. Consequently appears the importance of procedure and construction. Leading rules of evidence, pleading and practice often appear as rules of construction, *e. g.*, the record rule, what ought to be of record must be proved by record and by the right record (Planing Mill Co.), also, every presumption is against a pleader *(Verba fortius accipiuntur contra proferentem).* Procedure rests on these rules and it lies at the base of all subjects. Consequently appears the importance of procedure and construction. They are inseparable. Procedure presents the matter supporting construction. As that matter appears and is construed depends the substantive right. Whether the state had a cause of action against Bosso depended upon the rights of Burks. This depended on the record matter and its construction. The same observations apply in *Church v. U. S.* These cases and others cited indicate the difficulties and the importance of construction. It is the servitor of all subjects. It bears a most important relation to constitutional and statu-

4—*Verba intentione debent inservire.*

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tory law. Upon it depends the right application of codes as stated in relation thereto. These matters pervade all parts of the law, procedure, equity, contract, crime and tort.

Construction is enumerated and introduced as a conserving principle of procedure; its importance should be comprehended in relation thereto. Only those rightly taught in procedure can appreciate the importance of construction. They are reciprocals or correlatives. *Magna Charta* is cited six times in *Murray:* 219, upon a question of procedure therein, that charter and the federal constitution were discussed and construed. And so it is with thousands of cases. Many of the greatest constitutional discussions involve questions of procedure. A study of procedure is a study of government (Cruikshank: 232; Windsor).

Great judges construe from the grounds and rudiments of law and its conserving policies.[5] These in England are the unwritten constitution; in America they are the matter imported by *liberal* construction. Those who construe literally as did the courts *a quo* in the *Burks* and *Church* cases deny the power to expand, contract or modify as exigencies demand. The other and the prevailing school, especially in the federal courts, stand for the *unwritten constitution* in America as it exists in England but under the name of liberal construction. It is here that it has always existed, call it what name you may, the higher law or the unwritten constitution or liberal construction.

After furious contention the admiralty jurisdiction was established over the Great Lakes; the supreme law of the land gave international law; hundreds of decisions stand for the most liberal and broad construction (Hawaii v. Manchiki); the practice of the high court of chancery was given by statute and by rule of court; this was molded from the civil law; codes of civil procedure are modeled after the equity and admiralty conceptions. In case of a defect therein they are supplied from the analogies of equity;[6] these are contracted or expanded as the

5—§ 204, Hughes' Proc; *Audi alteram partem;* Haddock v. Haddock.

6—*Regula pro lege, si deficit lex.*

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conserving principles may require.[7] Now, if we avowedly had an unwritten constitution and were guided by it, would our courts pay any less regard to our written constitutions than they do? This is the question. Its answer will indicate whether we have a written constitution.[8] Also whether or not the law is judiciary made. To illustrate it is observed:

There is no express constitutional provision that courts must give judgment *secundum allegata et probata.* And they have held they can whenever they choose. And this is the way they did it: they followed *reason* as they saw it. The *reason* they found was error arising from erroneous definition, or too narrow a definition of pleadings. A definition of these—to apprise the adverse party of what he must meet at the trial—led errorists to believe "that pleadings were but notice, *and like any other notice they could be waived.*" For this waiver they applied the rule known as "the theory of the case." Upon this a score of courts are disregarding the record and the mystic rule.[9] They make of government an absolutism instead of a constitutionalism simply upon a too narrow and little definition.[10] From this as true reason there are applied the maxims, *Consensus tollit errorem* and *Modus et conventio vincunt legem.* If the definition were correct then the reason would be good, and reason is a ground and rudiment of law.

From the above viewpoint will appear the importance of accurate definition, also of the influence of reason, and the necessity for right reason.

The maxims and rules are many against such a view of the courts, and of such are these, variances and departures are forbidden, also *allegata et probata* must correspond, *Judex debet judicare secundum allegata et probata* (the judge ought to decide according to the allegations and proofs); what is not juridically made to appear cannot be judicially considered; a court is bound by its record. *Frustra probatur quod probatum non relevat* (it is vain to

7—Kollock v. Scribner; Campbell v. Greer.

8—2 Kent, 8, 12; POLICE POWER; MAXIMS: cases.

9—*See* CODES; CERTAINTY.

10—*Ignoratis terminis ignoratur et ars.*

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prove what is not alleged). These rules and maxims are a part of the unwritten constitution, and most American courts have respected them just as much as if they were expressed in their written constitutions. Those not understanding and respecting the maxims have made very serious attacks upon the base of constitutional jurisprudence. The situation shows the necessity of being rightly instructed as to what are the grounds and rudiments of law, also the conserving principles of procedure and of construing from these as fixed stars or beacon lights. Those who do not know them cannot rightly construe for a great nation nor more than for a tribe.[11]

The great charters of freedom should be familiar to the constructionist. He should understand that these are but little more than a recoinage of maxims from the civil law, from which come the leading canons of construction. These are the acorns of jurisprudence; from them have sprung the roots and heartwood. Construction is the sap of the plant. It is well expressly to recognize in this connection that much is written and taught opposing these views, especially in that literature that emphasizes that it is the "new," the "enlightened" and the "modern." It is overlooked that a restoration of the civil law is not really modern. It is the old law and its reaffirmation in great charters that dominates the later law.

Statutes of most states are modeled upon the same general plan, and as in Illinois wherein is found *Magna Charta*, the Declaration of American Independence, the Articles of Confederation, the Constitution of the United States and of this particular state.

Magna Charta is made up of guaranties of protection from despotic aggression. It reaffirms many fundamental principles from pre-existing laws which had long been trampled down by tyranny. It is construed by the "*metwand of the common law*," or to be more precise and suggestive, by the maxims from antiquity, the condensed good sense of nations, which are the grand old and chief stars that have always guided and illumined, leading the

11—Harrow v. Grogan (Ill.); Bowman v. P. (Ill.); 64 Cent. L. J. 129-134; 169-174.

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way like a pillar of fire by night and a cloud by day. American, organic and secondary laws are also construed by the same "*metwand of the common law.*" As *Magna Charta* burst forth and shone in the middle ages, so it was introduced by the federal supreme court in *Murray v. Hoboken Co.* (1855), wherein it is quoted leading the way and is cited with approval six times. *Taylor v. Porter*, *Hoke v. Henderson* and *Lane v. Dorman* (Ill. 1841) are also cited with approval. The *Murray Case*, the questions it discusses and the authorities it cites well introduce not only construction but constitutional law as well. These, along with *Marbury*, *M'Culloch*, *Cohens*, *Martin*, *Tarble's Case* and *South Carolina v. U. S.* (1905) will well introduce those subjects. The first ten amendments of the federal constitution if read in the light of *Barron* will impart a most important lesson, which is, that the limitations of the federal constitution do not bind the states unless they are named to be bound. This rule should be understood. A consideration of the foregoing will show how the leading subjects of the law interweave and interlace. The constructionist must understand this fact; for this view he should sufficiently dwell upon those propositions and the matter cited.

Construction is from the Roman and molds all law. All compacts and collocations of words are governed by the same canons with the least exception. International law is a part of the supreme law of the land (Art. VI, Fed. Const.). As it is construed so are all parts of the supreme law. International law is construed by the civil law from which it sprang. It is governed by Justinian's laws. From these arise the laws of the continental powers of Europe. Of these are the writings of Vattel, Puffendorf, Grotius and the Code Napoleon. All of these laws are from the civil law and are construed by it. A compact must be construed by the intention and understanding of the composer. *Verba intentione debent inservire.* Accordingly admiralty and equity have been construed. The maxims of construction are universal law, the laws of all civilized nations, tongues and kindreds.

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These maxims often influence or mold constitutions and inferior laws. They often appear exactly as an unwritten constitution (Trist v. Child; Oakley v. Aspinwall; P. v. Turner).

Where these maxims are disregarded there arise variant jurisprudences; then laws become tribal or local, also exceedingly fluctuating. This appears from a consideration of conditions discoverable in many states, *e. g.*, Massachusetts, New York, Pennsylvania and Illinois. In the latter procedure may be viewed from its eight interweaving or adjacent jurisdictions, namely, the admiralty, the federal, the state and adjacent five code procedure states. It cannot be said that any one has much respect for the other. They will all confess more respect for Blackstone, Chitty and Stephen than for the condition that has flowed from the old, loud and long proclaimed assertion that each correctly follows the law laid down by the great writers and teachers. It must appear strange to a reasoning intellect that thinks for itself that such a heterodox and benighted condition could possibly arise if the grounds and rudiments of law were even rightly introduced and cursorily taught. What these are is not generally known. This will be demonstrated by asking the Illinois lawyers only. Tests will show that they cannot agree as to what the great basic underlying fundamentals are. Now these must be known for intelligent, sound and lasting construction. Until these are stated and comprehended the best results of hundreds and hundreds of reports of books and of colleges are lost. Right views of construction in such jurisdictions are of leading importance. The law is an entirety and sound knowledge of one of its leading parts leads to a right knowledge of the whole.

The foregoing cases will disclose, and very plainly in *M'Culloch*, two schools of constructionists, one the liberal and the other the strict, or literal, or grammatical. The latter do not look favorably upon the maxims of the civil law. It has not favored the ends and purposes they have compassed. The doctrines of the forum are consistent with the view that there is an unwritten constitution.[12] The latter are followers of *Ita lex scripta est*, and that the power of parliament is omnipotent. The discussions of these warring sects would fill volumes.

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Procedure in a constitutionalism must primarily rest on three basic rules which often appear as either rules of evidence, of pleading, of practice or of construction. These universals are:

1. *The record rule: What ought to be of record must be proved by record and by the right record.*[13]
2. *The mystic rule: Every presumption is against a pleader.*[14]
3. *The coram judice rule: A court is bound by its record.*[15]

From and around these rules as a center issue and radiate numberless somewhat important and inferior rules which are paraphrased and repeated in many forms. Their accumulations aggregate volumes.

A disregard of the foregoing rules perverts or destroys a jurisprudence; they have a mystic influence. Therefore nothing more important is expressed in constitutions. And the situation is permissive of the statement that a study of these rules presents elaborate instruction and impressive views of constitutional law. They involve the conserving policies, especially appellate procedure, requirements to resist collateral attack, *res adjudicata*, the division of state power, due process of law, the election of remedies and constructive notice. Construction which overlooks and impairs these dominating initials of procedure subverts what constitutions expressly establish and declare for. These conserving policies are close affinities and auxiliaries of the grounds and rudiments of law, and of principal matters expressed in constitutions. Construction that does not take all into account is not broad or commanding. It is fragmentary. Construction from the teaching that criminal matters are more impor-

12—§ 204, Hughes' Proc. *See* Brown v. Tharpe; Henrico, 106 Va. 282, 117 Am. St. 1001.

13—*Expressio unius est exclusio alterius; De non apparentibus et non existentibus eadem est ratio;* Planing Mill Co.: 2*d*; Lane v. Dorman; Henrico County v. City of Richmond, 106 Va. 282, 117 Am. St. 1001.

14—*Verba fortius*, etc.; Crulkshank: 232; Dovaston: 217; Draper v. Medlock; Rideout v. Winnebago Co.

15—Planing Mill Co.: 2*d*; Lane v. Dorman. *See* CERTAINTY.

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tant and are more safeguarded than civil is not warranted upon principle. The primary and basic rules referred to apply equally to all judicial proceedings. To prove this one has only to examine any record from collateral attack or estoppel of record. A high test of construction is where a record is offered to prove title to property or estoppel. From these it will appear that all records are construed alike and the same yesterday, today, tomorrow and forever. It is well to observe that many constructionists oppose these views. The loose rules of aider by verdict, by pleading over, by waiver, are the make-up of the doctrine of the "theory of the case," which is untenable from constitutional viewpoints.

Courts that ignore or disregard the primary rules of procedure and of construction distort and destroy the unity and philosophy of procedure, and consequently of the law; for as they construe they make or mar. *Cujus est instituere ejus est abrogare* (he whose it is to institute can also abrogate). By no greater means than construction a jurisprudence can be undermined and destroyed.

Courts that respect the primary rules already mentioned make for their people very unlike laws from courts that confuse or deny them. The consequences of a disregard of those rules cannot be cured by the closest considerations and adherence to Blackstone, Chitty and Stephen. These authorities have not stated and taught those rules so courts can understand and apply them. (Atlantic.)

In appellate procedure are five most important matters, namely, the mandatory and the statutory record, the assignment of errors, the abstract of the record, and the argument, a part of which is the brief. The practitioner must be familiar with each of those records, its origin, functions and to what extent the assignment of errors may abandon or waive them and likewise the argument. Radiating from and connected with those documents are many rules of construction. Arising therefrom the decisions show more cases are lost than from any other source.[16]

The mandatory record is often tested

16—Planing Mill Co.: 2*d*.

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by the general demurrer, which searches the essential pleadings and attaches to the first fault. Another phase of this rule is the motion in arrest of judgment, and a last phase is, what is available on collateral attack. Here the ground of the general demurrer may be first raised or renewed. Throughout procedure it may be raised *ore tenus*. It may be so added or read into the assignment of errors. A proceeding open to collateral attack is called *coram non judice*. This will not sustain a claim of estoppel of record, or title to property founded thereon.[17]

All of the foregoing matters are discussed in relation to fundamental principles of government. They involve constitutional law and both express and implied. They call for the application of rules that are nothing less than parts of an unwritten constitution. Anyway, they are *constitutional implications*. As such the mandatory record should be studied.[18]

Waiver profoundly involves construction. It should be considered in relation to important maxims already mentioned.[19]

What one can and can not waive in procedure involves the matter of the mandatory and statutory records. This is important in considering matters of abatement or directory or ceremonial, and mandatory or imperative or essential or indispensable matter or proceedings. This brings into view the extended discussions relating to mandatory and directory statutes or constitutional provisions.[20]

Construction must be considered from many independent titles in this work. The great maxims of logic, fundamental law and many of procedure are also basic maxims of construction. The most notable federal cases involve those maxims, as will appear from considering *M'Culloch:* 147, *Marbury:* 142, *Tarble's Case:* 247, *Martin:* 246, *Gibbons, Ableman, South Carolina v. U. S., Cruikshank:* 232, and *Murray:* 219. Other cases will be cited in connection with these.

Barron: 241 already mentioned in-

17—Clem v. Meserole: 2*c*: cases.

18—§§ 6-12, Hughes' Proc.

19—*Consensus tollit errorem; Volenti non fit injuria; Communis error facit jus.*

20—See *De minimis non curat lex*, Hughes' Proc.

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volves a most important rule of construction which is often repeated.

Equity has greatly influenced and is continuing to influence the development of the law, or rather to shift it back to the reason and philosophy of the civil law. Many of the maxims of equity are impregnated with procedure, also construction; these are often parts of other rules.[21]

Incidents or implications are annexed by construction. M'Culloch: 147; *Expressio eorum*, etc. Fundamental principles also. Oakley v. Aspinwall: 222-225; Church, etc. v. U. S.; Trist v. Child: 214; Burks: 217*a*; Robinson v. R. R.; Haddock; Andrews; *S. v. Sheppard.*

Statutes annex themselves to contracts, i. e., the stockholder of a corporation is liable by merely buying the stock for its face value, for statutory liabilities, and as a partner if there is a defect in incorporating. Above and beyond all these are the liabilities imposed in all other states as a condition precedent to the corporation doing business therein.[22]

Practical construction. See *id.; Mueller; Maher*: 255; 2 Page, Conts. 1126; 9 Cyc. 588-590.

Intent as an element. Verba intentione, etc.

The equity of a statute is a much abused rule of construction. Its proper defines may be found in cases where it is applied to prevent fraud as in *Lester v. Foxcroft:* 341, and in cases to prevent an unjust application of the statute of limitations, also where the intention is sought and controls.

Generally: See Hughes' Proc.; 2 Page, Conts. 1103-1136.

CONSTRUCTIVE NOTICE: From Constructive Notice and its cognate principles, rules and the means that support it, the purposes of government, its fundamental principles and the interactions of adjective and substantive law may be revealed.

It seems well to observe, that government is primarily organized to protect property, to secure its possession, its enjoyment and its devolution according to the wishes of its owner. Therefore, property and government are closely associated. The guaranty for the protection of property is much better carried forward than is protection of life, limb and character. For the protection of life, limb and character the law is a very poor device. As to character, it will be found in operation practically a failure. From practical results in the courts it seems justified to observe that reputation must take care of itself; redress for injury to reputation depends upon many technical rules and recondite considerations. Many illustrations of this fact will be found under cases arising from defamation of character, and particularly defamation of women.

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It is in relation to property that the greatest value of jurisprudence appears; as to property the law has its greatest practical value. This fact will appear from a consideration of proving a title under an execution or a judicial sale. Williamson: 65; Windsor: 1; Clem: 2*c*: cases.

Proving a title or an estoppel of record founded upon judicial proceedings will fully satisfy the student that the law consists of technicalities, and that criminal law is not more technical than other important branches.

The interactions of remedial procedure upon title to property should be fully disclosed to every student. Then he will see how that very important principle of contract law, namely, *Caveat emptor*, is involved.

To impress the importance of Constructive Notice it has been gathered and enumerated as one of the conserving principles of procedure. It is in close affinity with *res adjudicata*, collateral attack and due process of law. From its requirements issue many of the rules of certainty; for its existence many rules of procedure are established and must be respected and enforced before justice to litigants can be properly considered. It is a doctrine that requires the forms of the law. It requires the mandatory record, also the distinctions between this record and the statutory record. The rule, that "what ought to be of record must be proved by record and by the right record" is nowhere of more importance or consequence than in relation to Constructive Notice. To illustrate: In some states

21—*See* EQUITY; MAXIMS; CODES; STATUTES.

22—*Qui sentit commodum sentire debet et onus.*

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statutes provide that from the moment of arrest for crime, the state has a lien upon all property, both real and personal, for the payment of any fine or costs of prosecution of the offender. Therefore, from remote incidents from justices' courts notice of justices' proceedings is presumed, and such presumptions affect the title to property.

There are many proceedings in courts of which one must take notice at his peril. Consequently the proceedings of him who would give that notice must be regular and sufficient; he must make or cause to be made a sufficient record—a record invulnerable to collateral attack—a record sufficient for tests of *res adjudicata*—a record sufficient to constitute a *coram judice* proceeding. From these observations it seems superfluous to add that many of the rules of pleading and of certainty arise from requirements of Constructive Notice. From the foregoing facts may be perceived the interactions of adjective and of substantive law.

It will prove very instructive to consider the ramifications of Constructive Notice throughout the subjects of Evidence and Pleading and Practice. The investigation will disclose the relations of government to procedure; also that the technicalities of the law are its safeguards.

Constructive Notice: A conserving principle of procedure. *See* CONSERVING PRINCIPLES, Hughes' Proc.; §§ 101-119, 146, 192-193, 201*a*, Gr. & Rud. Convenience, a ground and rudiment of law, supports. § 53, *id.* Title to property affected by. § 128, *id.*; Windsor: 1; Benton; Clem: 2*c*; Webb v. John Hancock Ins. Co.; Williamson v. Berry: 65; Acer, 40 N. Y. 384, 7 Am. Rep. 355, 42 L. R. A. 141: cases; *see* COLLATERAL ATTACK: cases; *Coram judice;* Deputron: 121; note, Lampleigh: 301; *Caveat emptor.*

CONSULS. Jurisdiction over. *Wilcox v. Luco* (1897), 118 Cal. 639, 62 Am. St. 305, 45 L. R. A. 579-588. See *sub* Cohens. And. Dic.

Jurisdiction and powers of consuls. Telefsen, sub Savacool; 45 L. R. A. 481-500. *Legatos,* etc.

Allegation of character of should be certain. Fabula. §§ 10, 11, Hughes' Proc.

CONTEMPORANEA EXPOSITIO EST optima et fortissima in lege: The best and surest mode of expounding an instrument is by referring it to the time when and circumstances under which it was made. Bro. Max. 682-685; 1 Kent, 464; 8 Cyc. 726, 736; 197 U. S. 430; 102 U. S. 64; *Lex non cogit,* etc.; Suth. Stat. 300, 307-312, 450, 451; End. 85, 357, 358; Sedgk. 212-214; 190 U. S. 245; Mech. Ag. 298; 2 Dev. Deeds, 85; 3 Wash. R. P. 384; Jones, Construc. Conts. 81-95; 1 Warv. Vend. 134; 31 Am. St. 301; Brown,

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88 Me. 49, 31 L. R. A. 116, n.; P. v. Adelphi, 149 N. Y. 5, 31 L. R. A. 510, 52 Am. St. 700; O'Donnell v. Glenn (1890), 9 Mont. 452, 8 L. R. A. 629, n. (*stare decisis* is a rule of public policy); note, 31 Am. St. 60; Harper: 218; *Verba intentione debent inservire;* New England Co. (this case neither omits or imports); Heydon's Case; Maher v. S.: 255; Noble v. Durrell: 251; Brown v. Spofford: 54; Lester v. Foxcroft: 341: cases; Strauder; Slaughter House Cases; P. *ex rel.* Mooney, 172 Ill. 486, 40 L. R. A. 770; Wilson, 117 Ind. 356, 10 Am. St. 48, n.; Calhoun, 106 Ga. 336, 71 Am. St. 254 (a code section from a decision must be construed in the light of its source).

Max. No. 28; §§ 289-294, *cited* p. 34; §§ 19, 29, 32, 35, 45, 169*a*, 178*a*, 180, 230, 234, 256, 264, 265, 291, Hughes' Proc.

Cited, §§ 115, 155, 157, 159, 221, 297*a*, Gr. & Rud.

The sense intended at the time must be adopted. 2 Whart. Conts. 635. *See* PRACTICAL CONSTRUCTION; Maher: 255.

Surrounding circumstances connected with the transaction and the situation of the parties may be considered in gathering and establishing the intent. Church; Keily; 60 Cal. 218; 2 Dev. Deeds, 839, Remy v. Olds (Cal. 1893) (no off. rep.), 21 L. R. A. 645; Horner (duration of a lease); Clayton; Lester: 341; Christy; Simpson, 145 Mass. 497, 1 Am. St. 480.

In stipulationibus id tempus spectatur quo contrahimus: In agreements, reference is had to the time at which they were made. Dig. 50, 17, 144, 1.

The object in view in all construction is to ascertain the intention, and, if a contract, the meaning of the parties. 3 Wash. R. P. 384, 404, 408. For this, surrounding circumstances and the pre-existing relations of the parties may be shown and considered to determine what they mean. Blossom v. Griffin (1856), 13 N. Y. 509, 67 Am. Dec. 75, n.; 1 Beach, Conts. 719-723; 1 Chit. Conts. 104, 105; Sattler v. Hallock (1899), 160 N. Y. 291, 46 L. R. A. 679: cases; 70 L. R. A. 450; Harper: 218. *Verba generalia restringuntur,* etc.; *Noscitur a sociis; Communis error facit jus; Ita lex scripta est.*

Ancient instruments—if obscure or doubtful, usage under them may be resorted to expound, though not to control, the meaning. Chad v. Tilsed (1821), 2 Brod. & Bing. 403-409 (6 E. C. L. R.), 22 R. R. 477, 14 Rul. Cas. 691, n.

Boundaries fixed and acted upon, although variant from calls in a deed, control. Knowles v. Toothaker (1870), 57 Me. 72, 3 Gray Cas. Prop. 297; Emery, 38 Me. 99, 3 Gray, Cas. Prop. 295; Heaton; Wilkins; *Falsa demonstratio.*

Construction involves many things and of a statute, five things. Heydon's Case. Construction of a contract often involves the practical construction put upon the contract by the parties themselves. The words they have employed import a different thing from that indicated by their acts and conduct, and thus the latter may be shown as part of the *res gestæ* to show intent. Practical construction put upon a contract by the parties is of weight. *Communis error facit jus.* Cool. Const. Lim. 85, 6th ed. *See* AIDER; Dobson (limitations); THEORY OF THE CASE.

It is often laid down that a perfect and

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unambiguous contract cannot be construed. Noble: 251; Houghton v. Payne (1904), 194 S. C. 88; Lewis, Suth. Stat. 550. Notes, 67 Am. Dec. 80, 81; Brown v. Spofford: 54 (instructive case). But the indorser of commercial paper may be shown to be a maker or original promisor, guarantor or indorser. Brown: 54.

Notwithstanding the strict rule excluding oral evidence, the principal maxim is frequently applied, and always in cases of doubt. McDonald v. Longbottom (1859), 1 El. & Bl. 987 (102 E. C. L. R.); New England Dressed Meat Co. Case, *supra.*

Intention, when manifest, will override words and will control the interpretation of the instrument, regardless of careless recitals or inapt expressions. Verba intentione, etc. Rockefeller v. Merritt (1896), 40 U. S. App. 666, 35 L. R. A. 633; Accumulator, 27 U. S. App. 364, 372, 12 C. C. A. 37, 41, 42, 64 Fed. 70, 74; 1 Chit. Conts. 104, 105.

Statutory construction. When enactments have long been acquiesced in, they operate as an estoppel and preclude any inquiry into their validity. P. v. Maynard (1867), 15 Mich. 463, 470, Cool. Const. Lim. 84, 310; Stuart v. Laird (1803), 1 Cranch (U. S.), 95, 2 L. ed. 214; Harvey v. Travelers' Ins. Co. (1893), 18 Colo. 354; End. Stat. 363; S. v. Wrightson (1893), 56 N. J. L. 126, 22 L. R. A. 548 (but meaning must be obscure).

Words used in a constitution are given the meaning they had when the constitution was adopted. De Camp v. Archibald (1893), 50 O. St. 618, 40 Am. St. 692, 696. Likewise a statute. Funk v. St. Paul R. R. (1895), 61 Minn. 435, 52 Am. St. 608; Work v. S.: 242.

Constitutions are considered with reference to the conditions existing when they are adopted. Fox v. McDonald (1892), 101 Ala. 51, 46 Am. St. 98; P. v. Adelphi Club, *supra;* Martin: 246; Church v. U. S.; 69 L. R. A. 185; 70 *id.* 450; South Carolina v. U. S.; Haddock.

The maxim was strikingly applied in M'Culloch. Debates in Congress upon a statute may be consulted. U. S. v. Trans. Mo. Freight Ass'n (1897), 166 U. S. 290; 70 L. R. A. 450.

Custom will not control a statute. Maher: 255; Noble: 251; Sedgk. Stat. 212-218; 2 Whart. Ev. 958; cases; Jones, Construc. Conts. 116; End. Stat. 357-395. Violation of a trust for two hundred years is no reason for its continuance. Atty. Gen. v. Bristol, 2 Jac. & W. 321; End. Stat. 358; Bro. Max. 682; Governor v. Withers (1848), 5 Gratt. (Va.) 24, 50 Am. Dec. 95-105, ext. n.; Feather v. R. (1865), 6 B. & S. 289, 292 (118 E. C. L. R.): stated, Bro. Max. 141; End. Stat. 195-357, 362 (a universal law cannot receive different interpretations at different times).

CONTEMPTS. Obstructing the due administration of the laws is a contempt of court.

Leading cases: S. v. Sheppard (1903), 177 Mo. 205-271: cases; 99 Am. St. 676 (constructive contempt); Hale v. S.; Burdett v. C. (1904), 103 Va. 838, 68 L. R. A. 251-264, ext. n.; Piper v. Pearson: 114.

Courts are charged by constitutions to convene, sit and administer the law. For this they have great inherent powers, which cannot be abridged. Bradley v. S. (1900), 111 Ga. 168, 78 Am. St. 157 (same act may be indictable).

Inherent powers of a court to punish contempts may be confined to those in facie curiæ. It is not fully conceded that constructive contempt is a matter for arbitrary assumption and disposition by the judiciary. Federal courts can not punish for publications and other constructive contempts. 4 U. S. Statutes at Large, 487; § 725, R. S. U. S. But the Supreme Court holds that no statute can abridge its powers. U. S. v. Shipp, 203 U. S. 563.

The inherent power of courts is above statutes, it is a constitutional power, and it is exercised in accordance with the prescriptive constitution. U. S. v. Shipp, 203 U. S. 563.

Contra: Farnam v. Colmon, 19 S. Dak. 342, 117 Am. St. 944-962, ext. n.

Courts have inherent power to punish for contempts committed in their presence or immediate view. Robinson, 117 N. C. 533, 53 Am. St. 596; Robinson, 19 Wall. 306; *Ex parte Jose Luis Fernandez* (1861), 10 C. B. N. S. 3 (100 E. C. L. R.), 15 Rul. Cas. 1, n.; 97 Wis. 1, 65 Am. St. 90, n. (must be case pending); Bessette v. Co. (1904), 194 U. S. 324.

The power to hear and decide carries with it the necessary means to accomplish that necessary end: Expressio eorum; M'Culloch; *Hale v. S.;* S. v. Townley: 225*a*; Bessette v. Co., *supra.*

Resistance to or obstructing the due administration of justice is the gravamen of the offense. P. v. Wilson (1872), 64 Ill. 195, 16 Am. Rep. 528-549, 1 Am. Crim. Rep. 107; 50 Am. St. 585, note to Percival v. S. (Publications).

Publications reflecting on courts and parties. Wilson; Myers v. S. (1889), 46 Ohio, 473, 15 Am. St. 638, n. (Judge); Percival v. S., *supra. Telegram Newspaper Co. v. C.* (1899), 172 Mass. 294, 44 L. R. A. 159, n.: cases (party); *Ex parte Barry* (1899), 85 Cal. 603, 20 Am. St. 348, n. (libel on judge, truth of charge not appearing for a defence); 2 Bish. C. L. 261 (5th ed.); S. v. Frew (1884), 24 W. Va. 416, 49 Am. Rep. 257-276; Clark v. P., Breeze (Ill.), 340, 12 Am. Dec. 177-186, ext. n. Not on pending case. Green: 90; 46 Tex. Cr. 576, 108 Am. St. 1035, noting the *Sheppard Case* (Mo.).

Public speeches reflecting upon a court trying a cause. R. v. Skipworth (1873), 12 Cox, C. C. 371, L. R. 9 Q. B. Div. 230, 1 Green, Crim. Rep. 121-131, 5 Moak, Eng. Rep. 456; 2 Bish. C. L. 259; Onslow v. Whalley (1873), 12 Cox, C. C. 358, L. R. 9 Q. B. Div. 219, 1 Green, Crim. Rep. 110, 9 Moak, Eng. Rep. 443.

Application for a change of venue from a judge without stating the reasons; conclusions of law a contempt. Ex parte Curtis (1859), 3 Minn. 274; Christ v. P. (1877), 3 Colo. 394 (facts must be pleaded). *Contra:* Hughes v. P. (1880), 5 Colo. 436.

Legislatures; their power to adjudge. Kilbourne v. Thompson (1881), 103 U. S. 168; 1 Kent, 236.

Limitations of power to punish for. In re Knaup (1898), 144 Mo. 653, 66 Am. St. 435, n. (*coram judice* proceedings essential); *Ex parte Lake* (1897), 37 Tex. Cr. Rep. 656, 66 Am. St. 848, n. (jurisdictional powers of the court must not be obstructed); S. v. Tugwell (1898), 19 Wash. 238, 43 L. R. A. 717 (publications), *Ex parte Ellis* (1897), 37 Tex. Cr. Rep. 539, 66 Am. St. 831 (violation of void order is not; *habeas corpus* will relieve); *Ex parte Tinsley* (1897), 37 Tex. Cr. Rep. 517, 66 Am. St. 18; Field v. Thornell (1898), 106 Iowa, 7, 68 Am. St. 281, n. (publications attacking parties); Telegram

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Newspaper Co. v. C., *supra;* P. v. Wilson, *supra;* 50 Am. St. 585, Cool. Torts, Bish. Crim. Law (publication), Brown, Jurisdic.
Courts that require the *coram judice* proceeding, as a basis to support a constructive contempt, do not require more than that there be appearance, and that the court could or might enter some kind of judgment or order within its jurisdiction. This must be true wherever pleadings are waived, or wherever jurisdiction depends on (1) jurisdiction of the person, and (2) a judgment entry which the court could or might have validly made. *See* ILLINOIS; COLORADO.
One in contempt is entitled to a hearing on the merits but to no grace. Hovey, *sub* Windsor: 1.
Sham and false pleadings are a contempt. Graver: 103; Brown: 105; S. v. Baughman: 268. Applications founded on sham and fictitious matter. Graver: 103. § 15, Hughes' Proc.
Or a false telegram to get a continuance. 45 L. R. A. 310. False allegations to give jurisdiction are. 45 L. R. A. 386; 9 Cyc. 7.
Justice of the peace has implied power. End. Stat. 419; Coleman, 112 Ala. 323, 59 Am. St. 111 (legislature may limit punishment). Farnham, 19 S. D. 342, 1 L. R. A. (N. S.) 1135-1145, ext. n.
Violations of injunctions by subterfuge. Ex parte Miller (1900), 129 Ala. 139, 87 Am. St. 49.
Tampering with witnesses—with the due administration of justice. Fisher v. McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. 971, n.
Non-payment of money into court; when a contempt. Silvia, 123 Cal. 293, 69 Am. St. 58; Everett v. Sparks, 107 Ga. 48, 73 Am. St. 107, n.; Frankel v. Frankel, 173 Mass. 214, 73 Am. St. 266; Trough, 59 W. Va. 940, 115 Am. St. 940 (*cites Windsor:* 1, *Hovey* and other cases). *See* ALIMONY.
Void judgment or order; there can be no contempt for disregarding. In re Christensen (1898), 17 Utah, 412, 70 Am. St. 794, n.: cases; Weaver v. Toney; *Ayres, In re* (1887), 123 U. S. 443.
Attorney acting bona fide upon orders of a court is not guilty of. In re Watts, 190 U. S. 1.
Charge of contempt must be certain, specific and positive. Herdman, 54 Neb. 626, 11 Am. Cr. R. 298 (strict procedure required).
Notary public cannot punish for. Jennings, Ex parte (1899), 60 Ohio St. 319, 71 Am. St. 720, n. (notaries have no judicial power).
Pardon of; governor may grant. Sharp v. S. (1899), 102 Tenn. 9, 73 Am. St. 851, n. *See* § 28, Hughes' Proc.
Forms; procedure. Post. Fed. Prac. 1318.
Issues in contempt cases; who tries. Debs.
The power arises from necessity, like the law of self-defense, and therefore ends with necessity; it also involves convenience. § 53, Gr. & Rud. The grounds and rudiments involve the unwritten constitution. § 28, Hughes' Proc.
As to legislative power to abridge the power of courts to punish for contempts. Bradley v. S., *supra;* § 28, Hughes' Proc.; 104 Am. St. 276, n.
Are local law. See FEDERAL; Patterson, 205 U. S. 364.
Generally: Rapalje; Thomas (constructive); 9 Cyc. 1-69; Brown, Jurisdic. 395-520; 2 Bish. C. L. 240 *a*, 261, 273, 1009-1013; 2 Bish. Cr. Proc. 879-898; McClain, C. L. 9; Van Fleet, Coll. Att. 185-189; Moak, Torts, 195-199; 1 Dill. Munic Corp. 246; 1 Beach, Corp. 294; Bouv.; And. Dic. 242-244; Wells, Jurisdic. 178-196; 2 Thomp. Tri. 124-189; 4 Encyc. Pl. & Prac. 764-821; Whart. Crim. Pl. & Prac. 948-975; Robinson v. S.; Yates, *In re;* 6 Am. Crim. Rep. 171-175; 9 *id.* 229; Piper: 114.

CONTINENTAL INSURANCE CO. v. Rhodes (1896), 119 U. S. 257, 30 L. ed. 380. Hanford: 86 (allegations essential to confer jurisdiction); Minn. v. Northern Co. (1904), 194 U. S. 48-73. *Cited,* § 78, Hughes' Proc.; Campbell v. Porter: 2; Cruikshank: 232; Thomas v. Board: 10*a*. *Cited,* §§ 113, 117, 119, Gr. & Rud.

CONTINUANCE. Stevenson v. Sherwood (1859), 22 Ill. 238, 74 Am. Dec. 140-151, 4 Encyc. Pl. & Pr. 822-912; 1 Bish. Cr. Proc. 951, 966*a*; Miller v. S. (1893), 31 Tex. Cr. Rep. 609, 37 Am. St. 836; R. v. Stevenson (1862), L. & C. 165, 9 Cox, C. C. 156, 4 Mews' E. C. L. 1801; 9 Cyc. 75-209; Bouv. Dic.
Absent witness no ground for, unless diligence to produce is shown. S. v. Burns (1899), 148 Mo. 167, 71 Am. St. 588, 4 Am. Cr. Rep. 52, 351.

CONTINUITY. A rule of evidence, of procedure; an important presumption pervading many branches. Carotti: 179; 1 Gr. Ev. 41, 42; 4 Wigm. Ev. 2530; Bell (enters into contracts); Adams: 326 (contracts by letter); Clayton (renewal of leases). §§ 11, 43, 46-48, Hughes' Conts. *Allegans,* etc.
Of jurisdiction essential for sound procedure. L.C. 70; § 44, Hughes' Proc.; §§ 272, 308, Gr. & Rud.
When a condition or state of being is once shown to exist, it is so presumed to continue until the contrary is shown. 1 Gr. Ev. 41, 42; Friend v. Ward (an agency is presumed to continue). If a term of court has closed, one may take notice of the record as it then exists, and rely upon it for constructive notice; and if no bill of exceptions exists or is provided for, then all waivable error is condoned.
Continuity affects procedure; the right thing must be done at the right time, in the right place, by the right person. Ricketson: 59 (publication of notice); Drew (assessing of property for taxation); *De minimis,* etc.; § 44, Hughes' Proc.
If an attachment is terminated, a custodian of property is not charged with notice of that fact until it is properly received. Conner v. Long (1881), 104 U. S. 228, 239.
In a plea of res adjudicata it must be alleged that the judgment is unreversed and unappealed from and is in full force and effect. *Verba fortius.*
Juridical documents; when pleaded, it must be alleged that they were filed and made of record and still remain of record, as by reference thereto will more fully appear. *Verba fortius.*
Of intention to stand upon exception matter is a leading rule of appellate procedure. Atlantic; ASSIGNMENT OF ERROR; L.C. 296.
Stability of procedure; rule is to sustain. *See* STABILITY; *Stare decisis.*
This rule was denied by a retrospective decision in relation to an office copy of a public document. *See* Breeze; Hughes' Proc.

Continuity.—

Will not aid a pleading. Averring one is a citizen before suit is brought is no averment that he is such when suit is brought. Craswell: 10; *Verba fortius*, etc.

Continuity essential in removal of causes. *See* JURISDICTION.

Of links of proceedings to prove title. L.C. 116 (rule well stated); Drew. Undue influence, if established, is presumed to continue. Whart. Conts. 162; Carotti: 179.

As to mental state. 12 Cyc. 389.

CONTRA BONOS MORES: Contrary to good morals. 2 Kent, 467; *Contractus ex turpi.*

CONTRACTS: Definition: Elements. A contract is a mutual agreement between competent parties, upon a sufficient consideration, relating to a lawful subject-matter evinced with certainty and satisfying the requirements of the statute of frauds. § 308, Gr. & Rud. General resume, § 280 id. The request, § 281, id.

Contracts have "fixed stars" or "datum posts," from which almost all relating to them can be reckoned. Chief among the elements are the *mutual assent* and the *consideration.* The mutual agreement is the assent, which arises from the offer and the acceptance or the request, the performance and the promise. To impress these first elements, to know, to perceive and to understand them, the cases of *Lampleigh* and *Bartholomew* (L. C. 301, 302) and cases cited therewith should be familiarized. A first precept to be mastered is *Non hæc in fœdera veni* (I did not come into this compact). This maxim involves the law of assent, of the mutual agreement. The law of the consideration is expressed in the maxim:

Ex nudo pacto non oritur actio: No cause of action arises from a bare agreement. For brevity this maxim is often expressed as *nudum pactum:* A bare or a naked agreement; or as a *nude pact:* An agreement not clothed with a consideration.

These maxims arise from the principles of the common law and are among the profoundest of the prescriptive constitution. *See* CAUSE OF ACTION.

The maxim last cited extends into procedure. Courts were not created and ordained to punish harmless liars, or deceivers, or promise breakers, but for other purposes entirely, to extend official aid to *wronged* persons when they properly state the facts constituting their *wrong* and properly apply for a remedy thereof. Therefore one must part with something,

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a match, a pin, a button or something or do something to gratify the request, or the caprice, or the whim of the promisor, although it may be nothing more than arising or sitting down, or taking a step, speaking politely, or blowing a breath. One cannot be a wronged promisee for which nothing whatever was given or done. Only a wronged person can have any standing in a court; he only can confer upon a court jurisdiction or power to convene, sit, hear, consider and give judgment. Courts are created by government to redress the *wrongs* of truly *wronged persons*, who appear and clearly and properly show to the court that they are *wronged.*

The right of any obligor to say: This plaintiff was not injured by a breach of my promise, is a formidable defense. Hendrick: 319; Lawrence v. Fox.

To define or describe an actionable wrong there must be filed a statement of the facts constituting the wrong or the cause of action, which must be sufficient to pass the general demurrer. Such a statement is indispensable for the foundation to rest the judgment upon when it is entered (Clem: 2c). From these observations will appear what the words *non oritur actio* imply. *See* CONSIDERATION; *Ex nudo.* Next will be introduced another maxim which involves the morality of the law that is very instructive:

In pari delicto potior est conditio defendentis: In equal fault the position of the defendant is preferred. It has important cognates which may be traced from *Contractus ex turpi causa*, or *Ex turpi causa*, or *Pacta.* § 18, Hughes' Conts. This maxim also involves procedural considerations, and such as these: That courts were not created to aid, promote or advance illegality, or oppose good morals *(contra bonos mores).* To such matters jurisdiction will not attach; such wrongs cannot be enforced at law. What courts were not created for they will not undertake to do; their acts relating to forbidden matters are *coram non judice*, or void matters. Courts cannot transcend the purposes for which they were created and exist. Courts do not sit to enforce honor among thieves, nor as a bandit dividing booty among the

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band. Juridical power can only be exercised for one who properly appears "with clean hands." *Crimen omnia.* The cases of *Collins v. Blantern*, Holman: 363, and Beaumont: 367, illustrate the foregoing conclusions.

Certainty is essential for all contracts—for the judgment, the deed and the simple contract, whether oral or in writing. L.C. 304-306; § 286, Gr. & Rud.; *see* CONSTRUCTION. The formalities and requirements of the statute of frauds must be observed. Wain: 335-341: cases; § 287, Gr. & Rud.

In apt and various relations all of the elements mentioned in the definition are given more extended and the completest attention, consistently with the plan of this work, one leading feature of which is to lead directly to the maxim or case on the subject one is considering.

It seems well to observe that the rules and requirements of contract are inseparably interwoven with rules of procedure. *See* Preface, Hughes' Proc. It will not only be very instructive but it is important as well for the student to perceive that relationship. *See* Preface, Hughes' Conts.

Parties may contract as they please. The contract the parties make will be enforced. The tenant may agree to rebuild the structure if burned, and the underwriters may insure it. The landlord may again have his building from the tenant and the insurance company will also have to pay for it. The tenant cannot plead the benefits given by the insurance company, nor can it plead the re-establishment of the improvements by the tenant. It is of no concern to either that the landlord is more than indemnified. For his consideration the tenant must perform, and for its consideration the insurance company must perform.

One cannot take advantage of his own wrong. Cutter: 308; see *Nullus commodum;* BREACH OF CONTRACT.

Master cannot contract for immunity for his negligence. Tanner, 184 N. Y. 379, 7 L. R. A. (N. S.), 537; N. Y. C. R. R.: 355; *In pari; Pacta.*

One must act bona fide in making an offer. Payne: 307; Gulick: 364.

One buying without an intention of paying acquires no title. Fitzsimmons: 384; see *Bona fide.*

It is not conceded that the assent and the consideration of contracts can be arbitrarily declared by statute; for a cause of action cannot be created by statute, and if that cannot be done, then the essential parts of

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an actionable wrong cannot be declared. However, it is to be borne in mind that there are views expressed to the contrary.

The right of a stranger or a third person to sue upon a contract is a leading question in contract. Hendrick: 319; S. P., Lawrence v. Fox.

CONTRACTUS EX TURPI CAUSA, vel contra bonos mores nullus est: See *Ex causa.* Dig. 2, 14, 27, 4. *In pari;* Holman: 363; *Jus publicum,* etc.; *Pacta,* etc.

CONTRIBUTION: Dering v. Winchelsea. Of sureties. Rees: 334*a*. Among wrongdoers. Merryweather, Smith's L. C.; 9 Cyc. 792-808.

CONTUMACIA EORUM QUI JUS dicenti non obtemperant, litis damno coercetur: He who fails to respond to a summons and plead is estopped by the judgment. §§ 48, 49, 198, 255, Gr. & Rud. *Defences not pleaded are waived.*

CONVENIENCE: See *Quod est inconveniens,* etc. A ground and rudiment of law. §§ 46, 53, 308, Gr. & Rud.

CONVENTIO PRIVATORUM NON POtest publico juri derogare: An agreement of private persons cannot derogate from public right. Dig. 50, 17, 45, 1. *Jus publicum,* etc. *See* CONSENT; § 18, Hughes' Conts.

CONVENTIO VINCIT LEGEM: The agreement of the parties overcomes or prevails against the law. Dig. 16, 3, 1, 6; Story, Ag., § 368. *Modus et conventio,* etc.; *Consensus,* etc.

CONVERSION: Cool. Torts, 516-551; Bish. 396-408; Cook, Corp. 15*b*. 475, 576, 765; 1 Kinkead, 579-597; 4 Suth. Dam. 1108-1142; Bigl. L.C.; Bouv.; And. Dic. *See* TROVER.

Conversion and reconversion. See EQUITABLE ESTOPPEL; Ackroyd; Fletcher; 4 Mews' E. C. L. 274-356.

Judgment against wrongful taker; when title to property passes. Miller v. Hyde: cases.

Sale of property by wrongdoer; when he may pass title. Bentley; 2 Kinkead, Torts, 585: cases.

CONVICTS: Felons undergoing sentence cannot contract. Ans. Conts. 104. *See* CIVIL DEATH. *See* SERVICE OF PROCESS.

COOCH v. GOODMAN (1842), 2 G. & D. (2 Adol. & El. N. S.), 2 Q. B. (42 E. C. L. R. 817) 580. *See* Swatman v. Ambler (1852), 8 Ex. 72, 4 Mews' E. C. L. 672. *Cited,* §§ 32, 33, Hughes' Proc.

Signature not necessary to deeds. Aveline v. Whisson (1842), 4 M. & G. 801, 4 Mews' E. C. L. 1020, 1 Dev. Deeds, 231: cases. S. P. Cherry v. Heming (1849), 4 Exch. 631. *See* Cooch; Ans. Conts. 46; Newton v. Emerson (1886), 66 Tex. 142. L.C. 346.

Only parties to a deed can sue upon it. Cooch; 4 Mews' E. C. L. 1070, 1071, 8 *id.* 854; City of Eaton Rapids, 127 Mich. 1, 89 Am. St. 451 (party in interest must sue); Washington v. Young (1825), 10 Wheat. 409; Williams v. Bankhead.

Where lessors need not execute, they may recover, although they executed the lease imperfectly or not at all. *Utile per inutile;* Cooch; Swatman; 4 Mews' E. C. L. 1067.

One seal may be adopted by many. Cooch.

Parties may make any contract they please. Verba intentione, etc.; §§ 3, 4, 32, Hughes' Conts.

May make non-assignable—non-negotiable—

contract, if they choose. Mueller (restrictions on assignability); 3 Page, Conts. 1209.

It appeared from the record that a corporation executed the lease sued on. Individuals sued upon it. *Held,* they could not recover. Cooch. The mandatory record showed a corporation was the plaintiff. At the hearing all parties agreed there was no such corporation. But this admission, so made, was unavailing against the record. The court was bound by its record, and could not take judicial notice that no such corporation existed. *De non apparentibus,* etc.

Under a statute, five commissioners might make a lease under seal, which they failed to do. But they contracted for a demise with a tenant, who, under that contract, entered on and enjoyed the premises as if a sufficient lease had been executed. But in truth he was nothing more than a tenant at will, and was without the fixed and certain estate he would have had, if a proper lease had been executed. He was sued in covenant, and he pleaded and showed he was a tenant at will only, and that he did not have and enjoy the certain fixed and permanent estate for which he contracted and agreed to pay rent. Upon this plea he was successful in that action of covenant. Swatman.

COOK v. BRADLEY: L.C. 314.

COOK v. ELLIS (1844), 6 Hill, 466, Sedgk. L. C. Dam. 741, 41 Am. Dec. 757, Pattee, Cas. 21.

Exemplary damages allowed. See *id.;* Merest. *Cited,* § 67, Gr. & Rud.

COOK v. WRIGHT (1861), 1 B. & S. 559 (101 E. C. L. R.); 3 Mews' E. C. L. 2024.

Forbearance as a consideration. § 122, Hughes' Conts.

COOKE v. OXLEY: L.C. 321.

COOPER v. CHITTY. Smith, L. C. *See* RELATION.

COOPER MFG. CO. v. FERGUSON (1885), 113 U. S. 727, 28 L. ed. 1137. Foreign corporations; what is "doing business in a state." Kirven; *Verba intentione,* etc.; Cook, Corp.

COOPER v. KANE: L.C. 403.

COOPER v. REYNOLDS (1870), 10 Wall. 308, 19 L. ed. 931. Williamson: 65; Bank v. Richardson (1899), 34 Or. 518, 73 Am. St. 673; *cited,* Brown, Juris. *See* Windsor: 1. *Cited,* pp. 6, 15; §§ 3, 9, 23, 24, 30, 44, 49, 57, 62, 63, 70 (stated), 71, 72, 81, 88, 113, 167, 173, 321, Hughes' Proc.; §§ 13, 96, 104, 108, 238, Gr. & Rud.

A court is bound by its record. Cooper v. Reynolds; Cohens: 244.

Jurisdiction of person and subject-matter essential. Windsor: 1; Sto. Pl. 473, n.

Consent cannot confer jurisdiction of subject-matter. Cooper v. Reynolds; Robertson, 162 Ill. 566; *Jurisdictio est potestas,* etc.; CORAM JUDICE. *See* discussion of *Cooper* in Hughes' Proc.

COPIES: How pleaded. Documents; how set forth. *Verba relata hoc maxime,* etc., may be *in hæc verba.* Wright v. Clements (1820), 3 Barn. & Ald. 503 (5 E. C. L. R.), 2 Lead. Crim. Cas. (B. & H.) 94-107, ext. n., 22 R. R. 465; § 282, Hughes' Proc.

Exhibits attached to a bill are no part of it. Caspary, 19 Or. 496, 20 Am. St. 842; 6

Encyc. Pl. & Pr. 299; 8 *id.* 740, 3 *id.* 312, 6 *id.* 653; R. v. Waverton: cases. *See* EXHIBITS.

Proof of public records by copies. L.C. 183; 3 Wigm. 1676-1684.

The lawful custodian of a public record has by implication of his office, and without express order, an authority to certify copies. Church v. Hubbart, 2 Cranch 186, 236, 3 Wigm. 1677.

COPULATIO VERBORUM INDICAT acceptationem in eodem sensu: Coupling words together shows that they ought to be understood in the same sense. Bacon, Max. Reg. 3; 35 Wis. 519. See *Ejusdem generis.*

COPYRIGHTS: 4 Suth. Dam. 1198-1199, Bouv. (1897), And. Dic.; Prince Albert v. Strange (1849), 1 Mach. & G. 25, 41 Eng. Reprint, 1171-1180, 2 De Gex & S. 652, 1 H. & T. 1, Cox, Trade-Marks, 51, 7 Rul. Cas. 73, 57 Fed. 434, 64 *id.* 280, 31 L. R. A. 286, 2 Pars. Conts. 322, High, Injunc., Beach; Atkinson v. Doherty (1899), 121 Mich. 372, 285, 80 Am. St. 507.

One's work is protected until he has published it. Prince Albert; 4 Mews' E. C. L. 460, 490, 500, 502, 507; 7 *id.* 1630, 1632 (no one can take advantage of his own wrong); Folsom v. Marsh (1841), 2 Story, 100, No. 4,910 Fed. Cas.; Cool. Torts, Pars. Conts., 2 Sto. Eq., Bisph. Eq.

Arrangement of works protected. 3 Sto. 768, 4 A. & E. Cyc. 164; 1 Cliff. 486; 15 Blatch. 550; Wood v. Boosey (1868), L. R. 2 Q. B. 340-357, L. R. 3 Q. B. 223-233, 18 Rul. Cas. 578, 4 Mews' E. C. L. 483, 512, 550. Also an abridgment of a large work. Gyles v. Wilcocks (1740), 2 Atk. 141, 7 Rul. Cas. 95, n.: cases; 26 Eng. Reprint, 489, 957; Folsom; Story v. Holcombe (1847), 4 McLean, 306, No. 13, 497, Fed. Cas.

Right to take citations from a copyrighted book. Edward Thompson Co. v. Am. Law Book Co. (1903), 122 Fed. 922, 62 L. R. A. 607.

Old matter cannot be protected independent of arrangement. Jollie v. Jaques (1850), 1 Blatch. 618; Boucicault v. Fox (1862), 5 Blatch. 87, 101; *stated,* 4 A. & E. Enc. 154.

Literary property. 7 Rul. Cas. 66-143. Infringement of; injunctions to restrain. 3 Suth. Dam. 1198, 1199, 1 Add. Torts, 60-71; Moak, Torts, 512-690, 2 Beach, Inj. 870-908.

Plans are a subject of. 9 Cyc. 908: cases.

Infringement of, must be aptly objected to. Gill v. U. S.

Pleading, practice, evidence—procedure. 5 Encyc. Pl. & Pr. 16-25. *Damages for: measure of.* 3 Suth. Dam. 1198, 1199; 1 Add. Torts, 60-71.

Copyright, generally. 9 Cyc. 889-976; 7 Rul. Cas. 66-143: cases (excellent *resume*); 4 Mews' E. C. L. 458-552; 2 Kent, 373-384; LeNeve: 396. *See* TRADE MARKS; PATENT RIGHTS.

CORAM JUDICE: Before a judge.

What a court will sua sponte notice, whether a party objects or excepts to it or not, is coram non judice. This needs no objection or exception, no assignment of error or presentation by argument to be available for denouncement by a constitutional court. Grave jurisdictional defects cannot pass as *coram judice.* Campbell: 2; Williamson: 65; Windsor: 1; Garland: 60; S. v. Baughman: 268; Martin: 246; Tyler v. Pomeroy; Campbell v. Greer: 2*a*; Roden v. Helm: 12*b*; Fish v. Cleland: 12*c*.

The Virginia court of appeals refused to

Coram.—
act upon the mandate of the federal supreme court because it was *coram non judice*, in the *Martin Case:* 246.
The *coram judice* proceeding, only, will support an estoppel or a title founded upon a judgment. Clem v. Meserole: 2c.
The record introduced for justification in *Tyler v. Pomeroy* (Mass.), also in *Piper v. Pearson:* 114, was *coram non judice;* similarly in *Windsor:* 1. *See* Hughes' Proc.; CORAM NON JUDICE.
Coram judice and coram non judice are correlatives. The distinction between the two expressions is of great significance to the practitioner, as will appear by reference to the sections of this work, which seeks to point it out and thoroughly impress it.
The proceeding obnoxious to the general demurrer or motion in arrest of judgment or collateral attack is *coram non judice.* §§ 40, 60, 61, 63, 70, 89, 95, 115, 120, 124, 170, 180, 218, 219, 235, 238, 241, 268, 278, Gr. & Rud.; *see* COLLATERAL ATTACK; CODE; Slacum.
CORAM NOBIS: Before us. Scope of writ. Collins v. S. (1903), 66 Kan. 201, 97 Am. St. 361-372, ext. n., 60 L. R. A. 572, n. *See* Freeman on Judgments.
CORAM NON JUDICE: Not a judicial proceeding. § 10, Hughes' Proc. §§ 40, 60, 61, 65, 89, 92, 124, 128, 162, 170, 186, 201*a*, 218, 219, 220, 241, 268, Gr. & Rud. *See* CORAM JUDICE.
Courts will sua sponte notice. Campbell v. Porter: 2; § 102, 186, 225, Gr. & Rud.
Abuse of the mandatory record or its matter is. §§ 61, 124*b*, 186, Gr. & Rud.
A matter neither juridically presented nor judicially considered is coram non judice; and so is a matter or proceeding not rightly and sufficiently evinced by the mandatory record. A careful consideration of the maxims, *Verba fortius accipiuntur contra proferentem; De non apparentibus et non existentibus eadem est ratio* and their cognate maxims and cases will instructively indicate what is a *coram judice* proceeding. The various relations in which the question is discussed and presented are easily gathered from the citations of those maxims and cases. § 115-123, Gr. & Rud., involve matter that may be considered, also the conserving policies. §§ 83-123, Gr. & Rud.; §§ 7-12, Hughes' Proc.
CORNELL v. GREEN (1896), 163 U. S. 75. The mandatory record must show a federal question. *See* Furman.
An assignment of errors cannot import a case. Cornell. *Cited,* § 178, Hughes' Proc.
CORNFOOT v. FOWKE (The fraud of the agent is the fraud of the principal. Fitzsimmons v. Joslin: 384): L.C. 385.
CORONERS: Inquests; preliminary examinations. Lancaster Co., 37 Neb. 528, 21 L. R. A. 394-399, n.; 5 Encyc. Pl. & Prac. 38-50; Bouv. Dic.; 4 Mews' E. C. L. 552-567.
Inquisitions; when admissible in evidence. Must be voluntary. 70 L. R. A. 33; Grand Lodge, 168 Ill. 408, 61 Am. St. 123, n.; Cox, 42 Or. 365, 95 Am. St. 752-774, ext. n.
Post mortem examinations; power to order. Young, 81 Md. 358, 31 L. R. A. 540, ext. n.
Coroners generally. 1 Bish. Crim. Proc. 143, 225, 229, 914, 1198-1200, 1255, 1257;

Coroners.—
Clark, Crim. Proc., 35, 50; 7 Rul. Cas. 144-178, n.: cases; 4 Mews' E. C. L. 552-567; 9 Cyc. 980-996.
CORPORALIS INJURIA NON RECIPIT æstimationem de futuro: A personal injury does not receive satisfaction from a future course of proceeding. Bacon, Max. Reg. 6; 3 How. St. Tri. 71.
CORPORATE EXISTENCE: Facts of, need not be alleged. L.C. 229, 230. *See* notes, 46 Am. St. 786. *Contra* cases, note, 35 Am. St. 291; Georgia Home Ins. Co., 75 Miss. 390, 65 Am. St. 611, n.; Bliss, Code Pl. 246-260.
Compliance with law; need not aver. It is matter for defense. Acme, etc. Co. v. Rochford (1897), 10 S. Dak. 203, 66 Am. St. 714, n.
CORPORATIONS: Cook, Corporations; Bouv.; And. Dic. 260-266; McClain, C. L.; 10 Cyc.; 19 Cyc. 1195-1350.
Contracts of; leading cases. Hill v. Boston: cases (*ultra vires*); Whart. Conts. 127-143; 2 Beach. 963-1053; Smith, 370, 379, n. L.C. 387.
Liability for torts. Craker; Merchants' Bank; Kansas City R. R.: 357; Hilliard; cases; Wyatt v. Rome (1898), 105 Ga. 312, 70 Am. St. 41, n. (municipal); Hill v. Boston. *See* RESPONDEAT SUPERIOR; NUISANCE. § 309, Hughes' Proc.
For crimes. McClain, C. L.; R. v. Birmingham, etc. R. R.; 9 Am. Crim. Rep. 370; Southern R. R., 125 Ga. 287, 114 Am. St. 203.
Limitations upon powers of. See *Ultra vires;* Hitchcock; Salt Lake; Whart. Conts. 130-137; 2 Page, 1065, 1097.
Over-issue of stock. 2 Bouv. Dic. 563. Fraudulent and over-issued stock. First Ave. Co. v. Parker (1901), 111 Wis. 1, 87 Am. St. 841-860, ext. n. Promoters. 2 Bouv. Dic. 778-780. Prospectus. 2 Bouv. 784; Keech.
Railroads. 2 Bouv. Dic. 813-819. Debts of railroad companies. 2 Beach, Conts. 1096-1117.
Reorganization and consolidation. 2 Bouv. Dic. 878-880; 2 Beach, Conts. 118-1132; Morrison, 79 Miss. 330, 89 Am. St. 598-656, ext. n.
Stockholders. 2 Bouv. Dic. 1039-1046. *See* STOCK; Thompson v. Reno, etc. Co.
Franchise. 1 Bouv. Dic. 839-841. *See* FRANCHISE.
Foreign corporations. 1 Bouv. Dic. 812-818. Jurisdiction of; process, how served; service on agent. Abbeville, etc., 61 S. C. 361, 85 Am. St. 890-938, ext. n.; Ald. Jud. Writs, 105-109; Aldrich v. Anchor Coal, 24 Or. 32, 41 Am. St. 831-837, n.; Foster, 5 S. Dak. 57, 49 Am. St. 859, 23 L. R. A. 490-504, ext. n.
Domicile of, or where they do business, is the place to serve them. Peterson, 205 U. S. 364.
When foreign corporations may be served in U. S. courts. Barrow Steamship Co. v. Kane (1897), 170 U. S. 100 (42 L. ed. 964: cases).
State may prescribe terms upon which they may do business. Blake, Cook Corp. 696-700; 19 Cyc. 1251; Ins. Co., 202 U. S. 246; Swing, 205 U. S. 275: cases.
Directors; their liability to the corporation. Bosworth v. Allen (1901), 168 N. Y. 157, 55 L. R. A. 751-775, ext. n.; Gerner v. Mosher (1899), 58 Neb. 135, 46 L. R. A. 244.
Liability of a corporation for the debts of its predecessor. Capital Traction Co. v. Offutt (1900), 17 App. (D. C.) 292, 53 L. R. A. 390, n.

Corporations.—

Debts of. 2 Beach, Conts. 1054-1095.

Consolidation; their rights to. Wood v. Seattle (1900), 23 Wash. 1, 52 L. R. A. 369-395, ext. n.

President and secretary not presumed to have power to give commercial paper. Gould, 134 Mich. 515, 104 Am. St. 624. Power to borrow and to give security. 118 Ky. 588, 111 Am. St. 302-330, ext. n.

Contracts with. Patterson v. Bank, *sub* Hill v. Boston. Irregular corporations. 2 Page, Conts. 1090-1102. Contracts of municipal corporations. 2 Beach, Conts. 1133-1210.

Foreign: doing business by; what is. Buffalo, 70 Ark. 325, 91 Am. St. 87, n.; Cook v. Howland (1902), 74 Vt. 393, 93 Am. St. 912, n. (may require that a resident act as agent); Cooper (what is doing business). States may prescribe terms upon which they may do business. Blake; Waters-Pierce Oil Co. v. Texas (1900), 177 U. S. 28.

Books of, right to inspect. Harkness, 27 Utah, 248, 107 Am. St. 664-668, ext. n.

Records of private corporations; must prove facts, required of. L.C. 46.

Are liable for wrongs like natural persons. Merchants' Bank. Estoppels apply to. Merchants' Bank; Craker.

Transactions in the name of supposed, but non-existing, corporations. Cannon v. Brush Electric Co. (1903), 96 Md. 446, 94 Am. St. 584-598, ext. n.

Non-resident may sue. Reeves, 121 Ga. 561, 70 L. R. A. 513-554, ext. n.; *Id.* 691-704.

Irregular corporations. 2 Page, Conts. 1098-1102.

Failure to file articles and amendments to. Jackson v. Crown Point Co. (1899), 21 Utah, 2, 59 Pac. 238, 81 Am. St. 651, n. (amendments, if more than formal, must be filed).

Validity of articles of incorporation cannot be inquired into incidentally and collaterally. Washington Investment Assn. v. Stanley (1901), 38 Or. 319, 63 Pac. 489, 84 Am. St. 793.

De facto corporation estopped to deny its existence with those it has contracted. Tulare Irr. Dist. v. Shephard (1901), 185 U. S. 1 (equitable estoppel applies to). *See* ESTOPPEL.

Dissolution of; how sued afterward. Shayne v. Evening Post Pub. Co. (1901), 168 N. Y. 70, 85 Am. St. 655.

Dissolution of; insolvency; effect. Griffith, 55 W. Va. 604, 69 L. R. A. 124-163, ext. n.

Organization of, in N. J., Del. and W. Va. 2 Eddy, Comb. 1237-1450.

Right to sell out. 180 Mo. 1, 103 Am. St. 534-572, ext. n.

Expulsion of members by corporations and associations. Delponte, 27 R. I. 1, 114 Am. St. 17-30.

Contempt, liable for. Franklin.

Liability of corporations to subscribers of their capital stock. Gettysburg, 95 Md. 367, 93 Am. St. 339-394, ext. n.

See FRANCHISE; OVER-ISSUE OF STOCK; PROMOTERS; PROSPECTUS; RAILROADS. REORGANIZATION; STOCKHOLDERS, BOUV. Dic.; 19 Cyc. 1195-1350.

CORPUS DELICTI: L.C. 185, 193; §§ 272, 294, Gr. & Rud.; Bine v. S. (1903), 118 Ga. 320, 68 L. R. A. 33-80, ext. n.; 3 Gr. Ev. 19, 30; Gill. Ind. & Coll. Ev.; McClain, C. L.; 1 Am. Crim. Rep. 318 (what sufficient proof of); 4 *Id.* 417.

Prosecution must prove with certainty; confessions will not prove. 12 Cyc. 483.

Constitutional evidence to prove. Hickory: 194; S. v. Gillis, 73 S. C. 95, 114 Am. St. 95.

How proved. S. v. Barnes, 7 Or. 592, 7 L. R. A. (N. S.) 181-188, ext. n. (circumstantial).

Corpus humanum non recipit æstimationem.

CORROBORATION: Of witnesses. L.C. 202.

COSTS: Ela v. Knox (1865), 46 N. H. 16, 88 Am. Dec. 179-185; Saunders, 5 Pick. 529, 16 Am. Dec. 394-407, n.; 1 Encyc. Pl. & Pr. 211-234; 2 Suth. Dam. 524-526; Bouv.; And. Dic.; Suth. Stat. 718; 1 Cyc. 1-293; 3 Cyc. 721-727.

Allowance of; depends on a statute, and it is strictly construed. Bish. Conts. 208; U. S. v. Tanner (1892), 147 U. S. 661; U. S. v. Jones, *Id. See* S. v. Hitchens (1900), 25 Ind. Ap. 244, 81 Am. St. 90; Miller v. Palmer (1900), 25 Ind. Ap. 357, 81 Am. St. 107.

Where no fee is prescribed none can be charged. U. S. v. McDaniel (1833), 7 Pet. (U. S.) 1, 8 L. ed. 587, n. *Nor contracted for.* Mullett, 150 U. S. 566, 37 L. ed. 1184: cases; U. S. v. King (1893), 147 U. S. 676: cases; 37 L. ed. 328. *See* American Steamship.

County only liable for, under a statute. Henderson v. Evans (1898), 51 S. C. 351, 40 L. R. A. 426; Sears v. Gallatin Co. (1898), 20 Mont. 462, 40 L. R. A. 405. *State likewise.* 42 L. R. A. 41, 44.

Extortion; oppression to take more than fee prescribed. Am. Steamship; Gr. Pub. Pol. 328; 2 Kent, 451, n.; 5 Am. Cr. Rep. 215; 16 Mont. 205, 50 Am. St. 498; 11 Neb. 157, 38 Am. Rep. 364-365; 8 Exch. 624; P. v. Gardner (1894), 144 N. Y. 119, 43 Am. St. 741; C. v. Mitchell (1867), 3 Bush. (Ky.), 25, 96 Am. Dec. 192-196, n.; Breckenridge v. S. (1889), 27 Tex. 513, 4 L. R. A. 360; Hooker v. Gurnett, 16 U. C. Q. B. 183; Williams v. U. S. (1897), 168 U. S. 382; Jones v. Commrs., 57 O. St. 189, 63 Am. St. 710, n.; Marcotte v. Allen (1897), 91 Me. 74, 40 L. R. A. 185 (money had and received will lie to recover back).

Demand of money colore officii is duress; payment is not voluntary; there is no assent.

Intent no element in this crime. Mech. Pub. Off. 1025, 72 N. C. 321, 2 Bish. C. L. 390-408, 5th ed.; 2 Gr. Ev. 596. See *Actus non facit reum,* etc.; Marcotte; 2 Bish. Cr. Proc. 356-364. *See also* EXTORTION.

Surplusage is a ground for imposition of costs upon the one at fault. Sto. Eq. Pl. 267.

Appellate courts; if improvident and extravagant and unnecessary, court will tax to party at fault. Cook, 98 Wis. 624, 67 Am. St. 830, 40 L. R. A. 457.

In the absence of a statute taxing them, each party pays his own costs. Chicago R. R. 151 Ind. 329.

Suits in forma pauperis. 11 Cyc. 200-204.

COTENANCY: Cotenants in mines. Cedar Canyon Co., 27 Wash. 271, 91 Am. St. 841-889, ext. n.

Possession of one, when adverse. 189 Mass. 64, 109 Am. St. 603-627, ext. n.

COTHRAN v. ELLIS (1888), 125 Ill. 496.

Appellate courts; limitation of their powers. Marbury: 142; Cohens: 244. "The facts put in issue by the pleas, and upon which the rights of the parties depend, were clearly and distinctly alleged on the one side and denied on the other." The burden of proof rested on the plaintiff. He offering none, it was the duty of the court to direct a verdict. *Actore,* etc.; Cothran: Avon.

Cothran.—

Judicial findings resting on no evidence may be sustained and upheld. Cothran; Windsor: 1. *See* ADMISSIONS; AGREED CASE.

There is a presumption that the evidence was sufficient, when there are allegations, in the absence of a proper bill of exceptions showing the contrary. *Omnia præsumuntur rite.*

Directing a verdict. It is the duty of a court to, in the absence of evidence or for want of sufficient evidence. Cothran; Bonnell: 185. *See* AGREED CASE; *Ad quæstionem,* etc.

Appellate court may review findings of fact and direct final judgment. Borg, 162 Ill. 348; McAfee. See *Ad quæstionem,* etc.; Cothran.

COTTRILL v. KRUM, *sub* Pasley: 375. *See* DECEIT.

COUNSEL: Arguments of. Brown v. Swineford; 4 Am. Crim. Rep. 338; 5 *id.* 499; 6 *id.* 21, 65, 487, 508.

COUNSELMAN v. HITCHCOCK: L.C. 178. §§ 262, 269, 271, 272, 292, 294, Gr. & Rud.

COUNTER-CLAIM; SET-OFF; REcoupment. Woodruff v. Gardner (1866), 27 Ind. 4, 89 Am. Dec. 477-492, ext. n.; 7 Laws. Rights, Rem. & Prac. 5471-5479; Bliss, Code Pl. 367-390. *See* §§ 43, 139, Hughes' Proc; § 40, Gr. & Rud.

Recoupment. Van Epps v. Harrison (1843), 5 Hill, 63, 40 Am. Dec. 314-337, ext. n., 2 Suth. Dam. 676, 3 *id.* 1165, 1171, 1 *id.* 327-395; Shoemaker v. Jackson; Wat. Set-off, 503, 563, 671, 455-589, 3 Sedgk. Dam. 1030-1075; McHard v. Williams (1896), 8 S. Dak. 381, 59 Am. St. 766: Mackenzie v. Hodgkin (1899), 126 Cal. 591, 77 Am. St. 209-217, n.

Cross claims against purchase money. 2 Suth. Dam. 632-641 (vendor and vendee).

Equitable set-off for insolvency, etc. 2 Sto. Eq. 1430-1444; Fera v. Wickham (1892), 135 N. Y. 223, 17 L. R. A. 456-462, n.; Nashville Trust Co., 91 Tenn. 336-358, 15 L. R. A. 710-717, n.; 152 U. S. 615; 47 Am. St. 576-595: cases; R. R. v. Greer: 283.

Reconvention. McLeod. *Damages on attachment bond in same suit.* 68 Am. St. 367. *Judgments; set-off.* 1 Suth. Dam. 198-207.

COUNTERFEITING: 2 Bish. C.L. 274-300; 2 Bish. Cr. Proc. 246-271; 5 Encyc. Pl. & Pr. 266-293; U. S. v. King; 11 Cyc. 300-323.

COUNTS: Each must be perfect in itself. L.C. 70, 71; *Verba relata,* etc.; Haskel: 101, Bliss, Code Pl. 119-121, 295.

Captions, signatures, allegations of capacity, verifications annex themselves if first or separately made. Expressio eorum, etc. Prolixity is to be avoided. L.C. 183. *Reference from one count to another to aid, when.* L.C. 70. "Said" and "aforesaid" incorporate a previous description, when. L.C. 70.

COUNTY: Liabilities of. White v. Co., *sub* Hill v. Boston. *For torts.* 39 L. R. A. 33-82, ext. n.; 11 Cyc. 325-615, 282 (costs); § 64, Gr. & Rud. *Procedure in cases against.* 39 L. R. A. 33-82. General discussion of. *Sub* Hill; And. Dic.

Legislative powers over. Lycoming v. Union, *sub* Hill; Suth. Stat. 662.

Estoppel applies to, like individuals. Knox Co. *sub* Hill.

Contracts with, when ultra vires. Auerbach, 23 Utah, 105, 90 Am. St. 685, n. See *Ultra vires.*

Limitation of indebtedness of. Beard.

COUNTY COMMISSIONERS: Jurisdiction and powers of. *Sub* Hill.

COURT MARTIAL: 3 Gr. Ev. 168-501; Milligan, *Ex parte;* 3 Cyc. 843-862.

COURTS: 11 Cyc. 633-1020. Are bound by their records. §§ 60, 88, 94, 167-169, 237-239, 269, Gr. & Rud.; Blair: 170; Munday: 79; Windsor: 1; Lane v. Dorman. *See* DEPARTURE; §§ 80, 99, 100, Hughes' Proc.

Rationale of this rule. Ins. Co.: 157; Houston: 245; Horan: 85; Cohens: 244; Marbury: 142. *See* MANDATORY RECORD. Gaines, 92 U. S. 10; McClain, Conts. Cas. 769 (removal of causes).

An appellate court is bound by the record presented. Cohens: 244; Cothran. *See* CONSTITUTIONALISM; 11 Cyc. 801-843.

Courts will afford remedies according to their records. L.C. 31, 32.

They are created by constitutions to afford remedies. Chisholm; Marbury: 142; Bouv., And. Dic. 273-287; §§ 3, 20, Hughes' Conts.

Contempts; power of. See IMPLICATIONS; CONSERVING POLICIES; Graver: 103; S. v. Townley: 225*a*; Suth. Stat. 88 (power to make rules); Campbell v. Greer: 2*a*; S. v. Sheppard (Mo.); § 28, Hughes' Proc.

Right to sue and protection is the fundamental right of civil liberty. Marbury: 142.

Must bona fide consider and pass upon constitution, if called upon without regard to grade. Marbury: 142; Lane.

Relief must be accorded record facts. Cothran. *See* DEPARTURE. *Ad quæstionem.*

"Again it is a rule that, on demurrer, the court will consider the whole record and give judgment for the party who, on the whole, appears to be entitled to it." And. Steph. Pl., § 108: cases (Tyl. ed. 180); §§ 6-8, Hughes' Proc.

And likewise, after an issue of fact, trial and verdict thereon. The grounds of a general demurrer may be raised at any time, and it searches the whole record and attaches to the first fault in the mandatory record. §§ 8-12, Hughes' Proc. And the record yet to be made—the statutory record—has nothing to do with this rule. Hughes' Proc.; And. Steph. Pl. §§ 6-12, Hughes' Proc.; Mallinckrodt: 12*a*.

Courts "of appellate jurisdiction only" demand certainty. Campbell v. Porter: 2; § 53, Gr. & Rud.

Must review the precise question. Marbury. *See* MANDATORY RECORD, §§ 6-12, Hughes' Proc.

Of original and appellate jurisdiction. Distinctions. Marbury: 142; §§ 110, 111, Gr. & Rud.

Superior and inferior courts. Distinctions. Piper: 114; 11 Cyc. 771-789.

A superior court of general jurisdiction has all presumptions in its favor. It has a clerk and a sheriff, and its record is made by general operation of law, and to these proceedings applies the presumption of regularity. But an inferior or statutory tribunal is a court of special jurisdiction, and such are justices of the peace, police courts and statutory boards and tribunals. These make their own records, and as they proceed. Crepps: 113; Harvey: 123; Clem: 2*c*.

Juries, not judges, try criminal cases. Ad quæstionem, etc.; L.C. 271; 9 Am. Crim. Rep. 532.

Power to suspend sentences. 9 Am. Crim. Rep. 439. *See* SENTENCE.

Governor's power to stay sentence. 9 Am. Cr. Rep. 502-504 (division of state power).

Province of court and jury. § 170, Gr. & Rud. *Ad quæstionem.*

Courts.—

Of appellate jurisdiction only; implications for. §§ 110, 111, Gr. & Rud; *see* IMPLICATIONS; CONSERVING POLICIES.

Superior and inferior. Crepps v. Durden; Clem v. Meserole: 2c.

COURTS OF RECORD: A court of record is one having a clerk; one where the judicial function is not charged with the duties of keeping the records of the tribunal, as are justices of the peace. *See* DUE PROCESS OF LAW RECORD; Crepps, L.C. 113.

In a general sense all courts are courts of record. A record is indispensable for the exercise of all official power, and to evince what was done. A record is implied. Bates: 225; Kollock; Iverslie: 46; 1 Freem. Judg. 35, 37, 76. Justices of the peace must have and keep a record, but they may gather the jurisdictional facts, make these of record, and then pronounce judgment upon those facts. In this is a leading distinction between "courts of record" and "not of record."

In courts of record, *i. e.,* superior courts, proceeding according to the course of the common law, if the court is regular, to it applies the presumption of regularity. *Omnia præsumuntur rite;* Crepps; Piper: 113, 114. But of records of inferior and statutory tribunals, every presumption is against them, and every jurisdictional fact must be alleged and proved. *De non apparentibus,* etc. All titles founded on the latter class of records are far more precarious than of the former, and all this difference on the sole account of the burden of proof.

In res adjudicata cases there are no presumptions in favor of even the records of a superior court. The rules of *res adjudicata* are most strict, and one is, that every presumption is against the record offered.

To what extent records will impart constructive notice to those contracting for titles dependent thereon, is a question of great concern. See CONSTRUCTIVE NOTICE; Clem: 2*c*; Windsor: 1; Deputron: 121.

When the judgment of a superior court is sued upon in an action of debt the presumption of regularity prevails. But it is otherwise in *res adjudicata* issues, constructive notice and appellate procedure. Notes to Lampleigh: 301.

Federal courts. 11 Cyc. 843-1020.

COVENANT: Action of. 2 Gr. Ev. 233-247, 1 Chit. Pl. 129-136, Bouv. Dic., And. Dic., Ans. Conts. 38, 39.

Covenants that run with the land. Geiszler v. De Graaf (1901), 166 N. Y. 339, 59 N. E. 993, 82 Am. St. 659-690; Gibson v. Holden (1885), 115 Ill. 199, 56 Am. Rep. 146-167, n.; Norcross v. James (1885), 140 Mass. 188, 54 Am. Rep. 151.

Spencer's Case (Spencer v. Clark) (1584), 5 Rep. 16*a*, Smith, Lead. Cas., 15 Rul. Cas. 232-296, ext. n., Shir. L. C., Laws. L. C., 2 Jac. Fish. Dig. 2899, Ang. Waters, Gould, Waters, 2 Gr. Ev. 240, Pars. Conts., 2 Chit. Conts. 1382-1400, 1 Add. Conts. 430-439, 2 Dev. Deeds, 958, 991, 1 Wash. R. P. 495-501, Hammon, Conts.; 11 Cyc. 1035-1183, 3 Page, Conts. 1285-1287.

Covenants restricting the use of land. Curran v. Boston (1890), 151 Mass. 505, 21 Am. St. 465, ext. n., 8 L. R. A. 243.

Vendee's knowledge of, is immaterial. Brown, 115 Tenn. 1, 4 L. R. A. (N. S.) 309-321, ext. n.

Restrictive; who may sue upon; privity. Summers, 90 Md. 474, 78 Am. St. 446, n.

Breach of covenants; measure of damages. Bain v. Fothergill (1874), L. R. 7 Eng. & Ir. App. 158, 14 Mews' E. C. L. 1324, 1340; Sedgk. Lead. Cas. Dam., Suth. Dam. 78, 99, 578, *stating* Bain, and Flureau v. Thornhill (1776), 2 Wm. Bl. 1078, 2 Suth. Dam. 591-631.

COVIN: Rules to exclude. *See* SHAM PLEADINGS; And. Dic.; §§ 5-5*b*, Hughes' Proc.; CERTAINTY.

COVINGTON AND LEXINGTON Turnpike Co. v. Sandford (1896), 164 U. S. 578.

Federal question must appear from *record proper. See* Furman: 147*a*; Martin: 246.

Must be raised before judgment; cannot be raised in petition for rehearing. Turner v. Richardson (1900), 180 U. S. 87.

COX v. HICKMAN, *sub* Waugh v. Carver.

COX v. TEXAS (1906), 202 U. S. 446-452. Federal question, how raised; must be prompt and explicit. Hulbert v. Chicago.

From the 14th Amendment only, it must appear that a federal question is involved. It cannot be aided by other parts of the constitution.

Laws regulating the sale of intoxicants may exempt those selling domestic wines.

CRAIG v. VAN BEBBER (1890), 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569-724, ext. n. (reviewing Zouch v. Parsons, Tucker v. Moreland, Vasse v. Smith, Peters v. Fleming, and many other cases, English and American): *cited* in 1 Mech. Sales, 96, 109; Beach, Conts.

Cited, §§ 55-61, 105, Hughes' Conts.; § 305, Gr. & Rud.

Infants; their status in contract law. *See* INFANTS.

CRAIN v. U. S. (1895), 102 U. S. 625 (40 L. ed. 1097, 54 Neb. 203, 11 Am. Cr. R. 645, 650, n. *Expressio unius,* etc. *Cited,* § 203, Hughes' Proc.

Mandatory record matter is not supplied by conduct before the court. Clark v. Sires: 2*b*; Iverslie: 46. *A formal plea of not guilty is not supplied by loose recitals.* Plea upon mandatory record essential. Munday: 79; Aylesworth, 12 Cyc. 372. *Cited,* §§ 59, 165, 168, 199, 203, 236, 243, 272, 276, 278, Gr. & Rud. Davis v. S. (Wis.); Grigg; Hoskins.

CRAKER (OR CROAKER) v. C. & N. W. Ry. Corporations liable for wanton acts of agents. M'Manus. §§ 296, 303, Gr. & Rud.

CRASWELL v. BELANGER: L.C. 10. § 119, Gr. & Rud.

CRATER v. McCORMICK (1878), 4 Colo. 196, 200. *Denials.* Dickson: 34: cases; And. Steph. Pl., § 132, p. 276, § 135, p. 286; §§ 42, 94, 181, 184, 251, 268, 324, 337, Hughes' Proc.

Admissions in pleadings; third persons may use. Boileau: 43; 1 Gr. Ev. 171, n.

Denials controlled by admissions. Dickson: 34.

General denial is qualified by an attending admission. Dickson: 34; Supply Ditch; Ansley; Singer Mfg. Co. v. Converse (Colo.); *Verba fortius,* etc.

Mandatory record matter controls. L.C. 15: cases; School District v. McComb (Colo.); Danielson v. Gude (1887), 11 Colo. 87.

A reply is essential for an issue upon the answer. Allenspach. *See* ADMISSIONS; Quimby v. Boyd (Colo.); Hume (Colo.): cases; Kollock (Wis.).

Crater.—
There can be no finding against record admissions. Bradbury: 35; And. Steph. Pl., § 132: cases (Tyl. ed. 216).
Nor evidence admitted against the record. Crater; Shutte: 291. *See* 17 Colo. 286; 8 Colo. Ap. 190. Nor presumptions from the record. Cothran.
Inconsistent defenses. Paul; Seattle: 36.
CREDIBILITY OF EVIDENCE: L.C. 185; *Posito; Falsus.*
CREDITORS' BILLS. Massey v. Gorton (1866), 12 Minn. 145, 90 Am. Dec. 287-301, ext. n.; 12 Cyc. 1-65; Bouv., And. Dic.
It must be averred that judgment has been obtained. Jurisdiction depends on this and other facts. 2 Beach, Eq. 890, 5 Encyc. Pl. & Pr. 460-525. Insolvency of debtor, and by showing judgment and execution and its return unsatisfied. *Contra,* O'Brien, 101 Iowa, 40, 63 Am. St. 368, 370 (acts may excuse issuance and return of execution); S. v. Goggin (1905), 191 Mo. 482, 486, 109 Am. St. 826 (*Lex neminem cogit ad vana*).
Return of execution need not be alleged by a lienor enforcing it under his judgment. 100 Va. 169, 93 Am. St. 944. Insolvency; how averred. *See* CONCLUSIONS OF LAW.
Of the demands which will support a creditor's bill. Ladd v. Judson (1898), 174 Ill. 344, 66 Am. St. 267-290, ext. n.
Pleading; necessary facts; Fraudulent conveyances. 1. Plaintiff a creditor at the time of conveyance; 2. Exhaustion of legal remedies (S. v. Goggin); 3. That the conveyance embarrasses the creditor; 4. Fraud must be pleaded by acts and conduct; 5. Insolvency of debtor; 6. That there is no other property [Wagner v. Law (1892), 3 Wash. 500, 28 Am. St. 56, 15 L. R. A. 784]; 7. The intent of the grantor and grantee. Cadogan, *sub* FRAUDULENT CONVEYANCES. *See* Wait on Fraudulent Conveyances; 2 Bigl. Fraud; SUPPLEMENTARY PROCEEDINGS; Lathrop; 20 Cyc. 726-750.
Facts, not conclusions, must be pleaded.
When a wife's separate estate may be charged by her husband's creditors with the value of its increase due to his acts. Morris, 67 Ark. 105, 77 Am. St. 87-109, n.
Attorney's fees; when allowed in. Campbell, — Tenn. —, 54 L. R. A. 817-827, ext. n.
Conditions in conveyance against creditors void. See SPENDTHRIFT; TRUSTS; Wilkins.
CREPPS v. DURDEN: L.C. 113. §§ 61, 104, 108, 202, 231, 296, Gr. & Rud.
CRESSY v. PARKS (1883), 75 Me. 387, 46 Am. Rep. 406. Officers abusing their process are trespassers *ab initio.* Six Carpenters'.
CREW v. KING (1778), 2 Wm. Bl. 1211, Ewell's Lead. Cas. Inf., Id. & Cov. 488, ext. n.
Entire estate; estate by entireties. Husband cannot alienate or assign. Back v. Andrew (1609), 2 Vern. 120; Prec. Chan. (Finch's) 1, 2 Eq. Cas. Abr. 230, Ewell's Lead. Cas. 488; Phelps v. Simonds (1893), 159 Mass. 415, 38 Am. St. 430, n.; Bramberry's Appeal (1893), 156 Pa. 628, 22 L. R. A. 594; Den v. Hardenberg (1828), 5 Halst. (N. J.) 42, 18 Am. Dec. 370-389, ext. n.; Hiles v. Fisher (1895), 144 N. Y. 306, 43 Am. St. 672, n., 30 L. R. A. 305-336, ext. n.; 1 Wash. R. P. 672-675.
Personal property is subject to. Bramberry's. Joint account in savings banks; survivor takes all. Mut. Sav. Bank v. Murphy (1896), 82 Md. 314, 31 L. R. A. 454, n.

Crew.—
Divorce dissolves and creates tenants in common and partitionable interests. Russell (1894), 122 Mo. 235, 43 Am. St. 381, n.
Reason for cessation of such an estate abolishes it. Cessante, etc.; Cooper (1875), 76 Ill. 57.
CRIMEN OMNIA EX SE NATA vitiat: Crime vitiates everything that springs from it. No right is founded on a felony. A thief can give no title. Bentley; *Ex maleficio,* etc.; *In pari.*
False and sham pleadings will not support a coram judice proceeding. §§ 5-5*b*, Hughes' Proc.; L.C. 102-105.
No contract can arise from forbidden matters. Ex turpi; Causa. See CONTRACTS. No obligation can arise therefrom. Hegarty (tort).
This maxim illustrates the relations of contract, tort and crime. *See* Preface, Hughes' Conts. § 92.
CRIMEN TRAHIT PERSONAM: The crime carries the person: *i. e.,* the commission of a crime gives the courts of the place where it is committed jurisdiction over the person of the offender. L.C. 172. *Crime is not transitory.* Mostyn: 274; Suth. Stat. 12.
CRIMES: Defined, § 291, Gr. & Rud.; maxims, cases, §§ 293, 294, *id.*
Act and intent must concur. Actus non facit, etc., is the fundamental maxim. P. v. Robey (exception); Suth. Stat. 526, 527. *See* ABDUCTION; BIGAMY; EXTORTION.
Unlawful subject-matter; illegal considerations involve criminal law. § 69, Hughes' Conts.
Indictment must charge. Wheatley: 19; Cruikshank: 232; Howard v. S.: 166; *Verba fortius,* etc.
Must have a punishment. There can be no crime without a punishment. *Ubi jus.*
How pleaded. 3 Gr. Ev. 1-39. L.C. 2, 19, 20-22, 69-71, 232. Facts must be pleaded. *See* CONSPIRACY.
Contract involves. See *In pari; Crimen;* Preface, Gr. & Rud.; §§ 21, 23, 69, Hughes' Conts.
Jurisdiction. Suth. Stat. 12; L.C. 172, 173, 274.
Federal government, its power and limitations to prescribe. Burton v. U. S.
Common-law crimes exist. And. Dic. (Scold); McClain, C. L. 12. *Crimes must be defined and known to the law before they can be committed.* Cruikshank: 232.
How crimes prescribed; what deemed criminal; classification of crimes. McClain, C. L. 12.
Criminal law; police power; definitions. McClain, C. L. 4. *See* Howard v. Fleming.
CRIMINAL COMPLAINT: *See* EXAMINATION OF PRISONERS. Conclusions of law insufficient for. L.C. 166.
CRIMINAL CONVERSATION: *See* SEDUCTION. 16 Cyc. 1626-1633.
CRIMINAL LAW: *See* CRIMES.
Criminal negligence supplies malice. R. v. Longbottom; R. v. Lowe. Criminal law must be understood to comprehend contracts rightly. Hughes' Conts. *See* INTRODUCTION, Hughes' Proc.
CRIMINA MORTE EXTINGUUNTUR: Crimes are extinguished by death. Death discharges bail. *See* BAIL.
CROAKER: *See* CRAKER.
CROFT v. ALLISON, *sub* Hilliard.
CROGATE'S CASE (1609), 8 Coke, 66, 1 Sm. L. C. 200-216, 8th ed. (5th, 6th, 7th editions, omitted in other editions).

Crogate's Case.—
Jurisdictional facts are not supplied by intendment or liberal construction or aider. Rice v. Travis (Ill.). *See* ALLEGATIONS.
CROMWELL v. COUNTY OF SAC: L.C. 26.
CROOKER v. HOLMES, *sub* Sturdivant v. Hull: 410. Commercial paper upheld if possible. See *Utite*, etc.; *Ut res magis*, etc.; Angle Case. *Cited*, §§ 20, 215, 233, 237, 250, Hughes' Proc. Likewise DEEDS; Wilkins.
CROPS: 12 Cyc. 95-987.
CROSBY v. WADSWORTH (1805), 6 East, 602, 2 Smith, Cas. Torts, 559; 1 Benj. Sales, 124, 1 Gr. Ev. 271, 2 Whart. Ev. 866, Cool. Torts, 390, 2 Wat. Tres. 789, 967, 3 Pars. Conts. 33, 62, 1 Chit. Conts. 415, 1 Add. Conts. 206; Beach; 3 Wash. R. P. 346, 2 Tay. Ev. 917, Browne, Stat. Frauds, 18, 284, Herm. Ex. 125-127; 102 Am. St. 223-247, ext. n.
Statute of frauds; interest in or concerning lands. Right to cut grass is such an interest. Crosby. Growing grass partakes of the nature of the realty. Chamberlain, 140 N. Y. 390, 37 Am. St. 568. Interest in lands does not include ripe but ungathered fruit crops, or products of the soil removed annually; but otherwise as to such products of the soil as are capable of permanent attachment to it. 2 Whart. Ev. 206; Ans. Conts. 61, 150; 20 Cyc. 209-238.
Sale of real estate; how affected by statute. Warv. Vend. 170-184. What property must be conveyed by deed. 3 Wash. R. P. 340-349; Heyn v. Phillips (1869), 37 Cal. 529; Huff. & W. Conts. 118. *See* FIXTURES; Elwes v. Maw; 12 Rul. Cas. 380-394: cases.
Growing crops; rights in relation to. 2 Wat. Tres. 739-742, 1 Benj. Sales, 111-118.
Strawberry plants while growing are not realty. Cannon, 75 Ark. 336, 112 Am. St. 64.
Crops as personal property for the purpose of levy and sale. Polly, 52 Kan. 478, 23 L. R. A. 258-264, n.; Dickey, 97 Mich. 255, 23 L. R. A. 449-479, ext. n. (sale on mortgage of future crops); Wootton, 90 Md. 64, 78 Am. St. 525, n.
Trees standing on the line; right to. 2 Wat. Tres. 734, 744. Sale of standing timber. Hirth, 50 Ohio St. 57, 40 Am. St. 641, 19 L. R. A. 721, n.; 85 Md. 666, 37 L. R. A. 449.
Equitable estoppel as a basis of title to realty. See *Allegans contraria*, etc.; Lindsay.
Growing timber forms part of the realty. Emerson, 95 Me. 237, 85 Am. St. 404, n. Crops as emblements in foreclosure suits. 9 N. Dak. 224, 50 L. R. A. 254.
CROSS ACTION: Bouv. Dic.; 2 *id.* 169. *See* COUNTERCLAIM; 16 Cyc. 324-335.
CROSS COMPLAINTS OR BILL (statement). Hurd v. Case (1863), 32 Ill. 45, 83 Am. Dec. 249-254, n. § 40, Hughes' Proc. *See* SUPPLEMENTARY PROCEEDINGS; Bouv. Dic. (leading rules); Sto. Eq. Pl. 389-402.
Must be good as a complaint. Indiana Ass'n v. Crawley (1898), 151 Ind. 413, 417, 418; San Juan Min. Co. v. Finch (1882), 6 Colo. 214. *Ubi eadem*, etc.; *Ambiguum placitum*, etc.
Must be consistent with the answer filed. Sto. Pl. 399, n.
Dismissing bill will not dismiss the cross bill. Kirby, 194 U. S. 141; McLeod; 16 Cyc. 468.

Cross.—
Court may require a response pleading to the answer to. Kollock.
CROSS EXAMINATION OF WITnesses. 1 Gr. Ev. 445; 2 Tay. Ev. 1285-1288; 1 Best, Ev. 100; 8 Encyc. Pl. & Pr. 96-122, Bouv. Dic.; 3 Wigm. 1833-1897.
Right to, is a fundamental one. L.C. 201; 1 Am. Crim. Rep. 618 (rights on); 10 *id.* 249 (right to be confronted with witnesses).
CROWNS v. FOREST LAND CO. (1899), 102 Wis. 104-107, 78 N. W. 97.
Bills of review are regulated by the code. Judgments may be impeached for fraud and collusion by a direct action filed at any time.
Codes are construed to amplify remedies, and analogously to other systems. Boni judicis, etc. Bliss, Code Pl. 141; Lewis, Suth. Stat. 569-572.
Judgment may be set aside for fraud. Needham v. Thayer. *Ex dolo malo*, etc.
CROWTHER v. FARRER (1850), 15 Q. B. 694 (69 E. C. L. R.); 1 Chit. Conts. 47, 1 Lang. 301.
Forbearance as a consideration. § 122, Hughes' Conts. *See* COMPROMISE.
CRUELTY TO ANIMALS: S. v. Robinson, *sub* MALICIOUS MISCHIEF. S. v. Beekman (1858), 3 Dutch (N. J.), 124, 72 Am. Dec. 352, n.; Tiede. Pol. Power; Bish. Stat. Crimes, 1100-1122; 2 Cyc. 341-353.
To animals and children. McClain, C. L. 1161-1164; 5 Encyc. Pl. & Pr. 695-697.
Killing trespassing chickens is. S. v. Neal, 120 N. C. 613, 58 Am. St. 810, n.
Shooting doves for amusement also, although they are used for food. Water v. P. (1896), 23 Colo. 33, 58 Am. St. 215, n. Bouv., And. Dic.
CRYPS v. BAYNTON (1614), Bulst. (Eng.) 31, Gt. Opin. Gt. Judg. 20; And. Steph. Pl. 368, 1 Chit. Pl. 259.
Cryps stated: C., an inn-keeper, at the request of B., provided his friend with food, necessaries and attendance amounting to £15, for which C. was compelled to sue, which he did in assumpsit, and alleged the promise and the fact that he had provided certain necessaries, but did not specify these in his complaint. B. objected to this, and insisted that the items of the account should be set forth. *Held:* This was unnecessary. (Coke, C. J.)
Pleadings; Bill of Particulars; Items; declaration need not contain items of bill of particulars. Note, 51 Am. Dec. 21; *Expressio unius*, etc.; *Utile per inutile*, etc.
A general mode of pleading is allowed where great prolixity is thereby avoided. 1 Chit. Pl. 259, 561, 16th Am. ed.; 566, 7th Am. ed.; Chicago, etc. R. R., 141 Ind. 267, 50 Am. St. 320; R. v. Waters: 71; R. v. Waverton: 70; Dewey v. St. Albans Trust Co. (1887), 60 Vt. 1, 6 Am. St. 84. (*Res adjudicata* plea may incorporate record by reference). *Omne majus continet in se minus.*
Bill of particulars amendable. Wright v. Dickinson (1887), 67 Mich. 580, 11 Am. St. 602, n.; McDonald v. P.
Bill of particulars generally. Expressio unius.
Purpose of codes is to avoid prolixity. Brugger: 162.
A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty. Certum est quod, etc.
Conclusions of law and fact. Indebitatus assumpsit, as pleaded at common law, is

Cryps.—
sufficient under a code requiring facts. In other words, the common count, its general language, expressions, its conclusions of law and fact, are permissible under codes to avoid prolixity, but repeating the cause of action in fictitious forms, and thus causing prolixity, is another question. L.C. 111.
Facts; how pleaded. See Moore: 21; Dovaston: 217; FACTS; ALLEGATIONS.
Best evidence; appointment to office. Generally it is sufficient to show that an officer has acted as such. 1 Gr. Ev. 41, n., 83, 92; *Utile per inutile,* etc.
Duplicate statements forbidden. Bliss, Pl., §§ 159-171. More than enough should not be required. *Lex neminem cogit,* etc. If more is presented, it is surplusage, and should be stricken as such. Surplusage should not be permitted against objections to it. If causes are repeated they should be stricken or consolidated. Prolixity is to be avoided. Every party litigant has an interest in the record and that it be made concise and certain. See *Res adjudicata*; CONSTRUCTIVE NOTICE; § 53, Gr. & Rud. (convenience).
"Pleadings should be in ordinary and concise language, without unnecessary repetition," is the language of the codes. Sturges: 111. Under these it is not permissible to repeat a cause of action in varied or fictitious forms, or in any other way needlessly repeat them. L.C. 162. When once stated, all needful relief flows from such statement. Bliss, Code Pl. 159-172; Brugger: 162, *e. g.* it is not permissible to plead the common counts as at common law. Sturges: 111; Whitney: 112. *Cessante ratione legis cessat ipsa lex.*
Irrelevant, redundant and immaterial matters should be stricken. L.C. 110. But objections to these should be exact, apt and precise. Kraner: 299. These have different shades of meaning, and a pleading faulty for one is not necessarily faulty for the other. Objections involving these should not be confused or jumbled. *See* ABATEMENT.
Nor should motions be successively made of the same degree and character. 1 Chit. Pl. 440, 441 (456, 457, 16th Am. Ed.). *See* ABATEMENT. The rule is not enforced in pleas of justification and mitigation in defamation suits, or indictments. Notes, J'Anson v. Stuart, 2 Sm. Lead. Cas. Nor in averring adultery in divorce cases, nor in pleadings involving the equitable exceptions to the statute of frauds. Lester: 341. Nor in injunction and other equity causes. Here the facts must be pleaded with great fullness and detail. Vague and ambiguous pleadings are avoided. J'Anson: 91; Lea: 30. Surplusage should be stricken from pleading and excluded from evidence. Much desultory and variant discussion is found in the decisions and textbooks about the rights of parties and the duties of courts with reference to surplusage. Practically, this is the rule: "You shall not respect a rule unless you choose to." Such appears the rule that surplusage should be excluded. L.C. 30.
Sham, false and irrelevant pleadings should be stricken, on motion. Pleadings should be certain and free of ambiguity. Lea: 30. And motions to make them so should be favored. Gay: 138; P. v. Ryder, 12 N. Y. 433; Kollock.
Appellate procedure; prolixity is to be avoided in. L.C. 290. *See* BILL OF EXCEPTIONS.
Abstracts of the record only need be printed

Cryps.—
if parties so designate. Rule Sup. Ct. U. S., 120 U. S. 785.
Legislatures cannot abolish rules requiring allegations of certainty. Huntsman: 231; McLaughlin v. S., 45 Ind. 338; Cool. Const. Lim. 327; Moore: 21; O'Connell: 224; S. v. Beach: 258; Kollock.
Criminal cases; court may order bills of particulars in. 1 Bish. Cr. Proc. 643-646. And that a defendant in a defamation suit furnish. C. v. Snelling; L.C. 70, 71.
CUICUNQUE ALIQUIS: Also *Cui jurisdictio,* etc. See *Expressio eorum.*
CUILIBET IN SUA ARTE PERITO EST credendum: Credence should be given to one skilled in his profession. Bro. Max. 931-938. *See* EXPERTS. Hammond; Mallan: 373; Pinney; Hanley: 204.
CUJUS EST DARE EJUS EST DISponere: He who has a right to dispose of the gift may regulate its disposal. Bro. Max. 459-475. *Nemo dat quod non habet;* Bentley; Egerton; Lowe v. Peers; Scott v. Tyler; Shelley; Dumpor; Spencer; Sexton v. Chicago Storage Co.; Harding v. Glynn; Jackson v. Phillips.
CUJUS EST DIVISIO ALTERIUS EST electio: Whichever of two parties has the division, the other has the choice. Coke, Litt. 166. *See* ELECTION.
CUJUS EST INSTITUERE EJUS EST abrogare: Whose it is to institute, his it is to abrogate; or, he who can institute can abrogate. Sydney Govt.; S. v. Bolden: 216: cases. *See* citations, also further observations, Hughes' Proc.; also *Lex non exacte,* etc.; Houghton v. Gilbart; Perez v. Fernandez. *Cited,* §§ 6, 20, 24, 79, 102, 123, 134, 139, 151, 189, 240, 241, Gr. & Rud.
This maxim involves views of the prescriptive constitution. S. *ex rel.* Henson v. Sheppard; *Lex non exacte,* etc. *See* CONSTRUCTION.
CUJUS EST SOLUM EJUS EST USQUE ad cœlum: He who owns the soil owns it up to the sky. Bro. Max. 395-401; Bright; Goddard; Elwes. *Quicquid plantatur,* etc.; 29 Mo. 152.
CUMBER v. WANE: L.C. 311. Rule in, ambiguously discussed. Bish. Conts. 54-101.
CUMULATIVE EVIDENCE: Bouv. Dic.; L.C. 183, 185.
CURSUS CURIAE EST LEX CURIAE: The practice of the court is the law of the court. Bro. Max., pp. 133-135; Deering. *See* RULES OF COURT.
Courts may establish rules of practice. Suth. Stat. 88. Legislature empowers them. *See* § 28, Hughes' Proc.
CURTESY: Estate of. 12 Cyc. 1001-1021. Collins, 184 N. Y. 74, 112 Am. St. 569-596, ext. n.
CUSTODIA LEGIS: Property *in custodia legis* is protected from interference from other courts. *Qui prior tempore,* etc. Freeman: 287; 1 Beach, Pub. Corp. 338; 1 Kent, 410; 29 Am. St. 311, 318, n.; Cobbey, Replev. 704-725.
Proceedings, coram judice and a regular warrant essential to constitute a thing custodia legis. Cobbey, Replevin, 299. Pitkin Co., 62 Neb. 385, 35 L. R. A. 280, n. The foundations of the right may be inquired after, and of course as by collateral attack. See *Coram judice.*
Sheriff in possession of chattels under replevin, a stranger cannot replevin from him. Welter v. Jacobson (1897), 7 N. Dak. 32, 66 Am. St. 632 (contempt to do so).

CUSTOM AND USAGE: 2 Gr. Ev. 248-252; Wigglesworth: 399; Zane, Banks, 114. See *Optimus interpres rerum usus.* Bouv.; And. Dic.; 1 Beach, Conts. 747-770; 12 Cyc. 1028-1103. He who asserts it must allege and prove it. Reinh. Ag. 194: cases.

Agent may be authorized by custom and usage. Merchants' Bank.

Cannot prevail against a statute. § 180, Hughes' Proc.; *Contemporanea,* etc.

Oral evidence to explain. § 350, Hughes' Proc.

CUSTOM DUTIES: 12 Cyc. 1104--1189.

CUTTER v. POWELL: L.C. 308.

CY PRES: Nicholl (1777), 2 Wm. Bl. 1159; Moneypenny v. Dering, 16 M. & W. 418, 2 De G. M. & G. 145; Bouv.; And. Dic.; Bro. Max. 569, n. *See* CASUS OMISSUS: cases; Gray's Perpetuities applies only in Maine, Massachusetts and Rhode Island.

Applies only in wills and settlements; it is not applied to deeds. Gray, 646.

It is not a rule of construction. Gray, 629.

DA COSTA v. JONES: L.C. 361.

DALBY v. INDIA & LONDON LIFE INS. Co. (1854), 15 C. B. 365 (80 E. C. L. R.); 2 Sm. Lead. Cas. 300, 8th ed., 11th ed. (reviews recent English cases); 13 Rul. Cas. 382-400, 8 Rul. Cas. 440; 104 Ga. 446, 44 L. R. A. 376; Mews' E. C. L. 3, 10, 90; 2 Gr. Ev. 409; Suth. Dam., Ans. Conts. 181, Pars., Add., Gr. Pub. Pol.

Life insurance is not a contract of indemnity only. See Godsall. A recovery may be had against a trespasser, and for the insurance as well. 8 Rul. Cas. 440; Dering.

DAMAGES: Involve a discussion coextensive with rights and remedies; what government is obligated to protect, and the jurisdiction of the courts it creates therefor. It often involves phases of the proposition that every man is his brother's keeper. U. P. R. R. v. Cappier. Tort, negligence and damages are leading branches; their principles should be familiar to every jurisprudent.

Damages is a topic of much consequence, and almost deserves the distinction of one of the leading subjects of the law. Its importance is duly emphasized from its very considerable distinctive literature, the most prominent of which are Sutherland's Damages (4 vols.), Sedgwick (3 vols.), Joyce (2 vols.) and Field (1 vol.). Beyond this array, the works on various subjects give the topic considerable space. Excellent resumes of it are found in 2 Gr. Ev. 235-272; Bouv. Dic.; 2 *id.* 383-395 (measure of); And. Dic. 304-309; 13 Cyc. 1-254; 5 Mews' E. C. L. R. 263-395; Cobbey, Replev. 844-976; 3 Page, Conts. 1569-1598. Almost all works relating to procedure — evidence, pleading, practice, injunctions, attachment, etc.—state many of the leading rules of damages.

Punitive damages for malicious assault and battery are held, in *Hanna* v. *Sweeney* (Conn.), 4 L. R. A. (N. S.) 907, not to be allowable beyond the expenses of litigation in the suit, less taxable costs.

Maxims of the subject include some of the most instructive, such as *In jure non remota causa sed proxima spectatur* (remoteness, privity); *Ubi jus ibi remedium; Volenti non fit injuria* (contributory negligence); *Actus Dei nemini facit injuriam* (accidents); *Actio personalis moritur cum persona; Omnia præsumuntur contra spoliatorem* (*Armory:* 180); *Nullus commodum capere potest de injuria sua propria* (it is no defence that accident or necessity combined with one's negligent act); *De minimis non curat lex; Rex non potest peccare; In pari delicto potior est conditio defendentis* (immunity by contract); *Damnum absque injuria* (Ashby: 273); *Caveat emptor* (Pasley: 375); *Sic utere tuo ut alienum non lædas* (so use your own property as not to injure another); *Ex dolo malo non oritur actio* (no cause of action arises from fraud); *Salus populi suprema lex* (that regard be had for the public welfare is the highest law).

Leading cases: Scott v. Shepherd: Squib Case (remoteness—privity. One is presumed to intend the natural, direct and probable consequences of his act. *In jure non remota*); Hadley v. Baxendale (*In jure non remota;* application in contract, also tort); Victorian R. R. v. Coultas (fright caused by objects of terror); Wright v. Winterbottom (contract—privity); Thomas v. Winchester (contract—privity—sale of poisonous drug under harmless label); Langridge v. Levy (contract—privity); Coggs v. Bernard: 350 (negligent act of volunteer); Railway v. Lockwood: 352 (injury to passenger riding on a free pass; *In pari*); Calye's Case: 356 (innkeeper's liability); Frost v. Knight: 308*a*; Hochster v. De La Tour: 308*b* (breach of contract); Chandelor v. Lopus: 374; Pasley v. Freeman: 375 (deceit—liability for—*Caveat emptor*—breach of warranty); Kemble v. Farren: 391; Sloman v. Walter: 393; Peachy v. Somerset: 392 (stipulated—fixed damages by contract); Merest v. Hervey (exemplary — punitive damages — smart money); Armory v. Delamire: 180 (every presumption is against a wrongdoer); Ashby v. White: 273

Damages.—
(*Ubi jus*); Lumley v. Gye (enticing one to break a contract); McCardle v. McGinley (malicious arrest—malicious acts causing damage); Harrison v. Bush; Pollard v. Lyon (defamation not always actionable); Roller v. Roller (parent not liable to child for torts); C. v. Neal (husband liable for torts and misdemeanors of wife); Hanson v. Krehbiel (limitations of legislative power to give immunity to tort—to defamation).

Pleadings and proof of. Sutherland on Damages (a valuable work for practitioners).
Great cases, maxims and principles. § 67, Gr. & Rud.
Allegata et probata essential for. Cobbey, Replevin, 924-930. The right to, is founded on the allegations, and the amount of recovery is measured by the proof. Claim for, must be *bona fide.* Weltmer: 268a; *Fabula.*
Conflict of laws as to measure of. Gray, 108 Tenn. 89, 91 Am. St. 706-743, ext. n., 56 L. R. A. 301-316, ext. n.
Double damages must be claimed in the pleadings. 2 Suth. Dam. 464.
Exemplary damages allowed, notwithstanding one's liability to be criminally punished. Wagner: 290 (this rule prevails agreeably to *stare decisis,* in Ark., Cal., Del., Fla., Ill., Ky., La., Me., Mich., Minn., Miss., N. Y., N. H., N. C., Ohio, Pa., S. C., Tex., Vt., Va., W. Va., Wis.); Merest (exemplary damages); McClain, C. L. 11; Cobbey, Replev. 924-930: cases.
Injuries too trifling for the law to notice—De minimis non curat lex. Motive as affecting damages. *See* Mahan; MALICIOUS ACTS; MOTIVE.
Liquidated damages. L.C. 391, 392, 393; Ans. Conts. 250, n., 225, 256; 2 Bouv. Dic. 261, 262. *Stipulated.* Kemble v. Farren, L.C. 391: cases.
Caused by malicious acts, actionable. McCardle; Grainger; Allen v. Flood; Lumley. *See* MALICIOUS ACTS; MOTIVE. Resulting from intoxication. Suth. Stat. 695-700. No apportionment among liquor sellers. Suth. Stat. 700.
Mental suffering. Malsenbacker, 71 Conn. 369, 71 Am. St. 213, n.; Cowan v. W. U. T. Co. (1904), 122 Iowa, 379, 64 L. R. A. 545-551: cases; 70 L. R. A. 289, n.; 2 Bouv. Dic. 398.
Fright: Victorian Case. Watson v. Dilts (1902), 116 Iowa, 249, 89 N. W. 1068, 93 Am. St. 239, n.
Nominal damages. When too remote. *In jure non remota,* etc.; Gilson; Hadley; Thomas v. Winchester; Langridge. For fraud and deception. Angle; § 96, Hughes' Conts.
"Damage without injury." A loss for which no recompense can be obtained. Ashby, L.C. 273.
Attorney's fee; constitutionality of statute allowing. Dell v. Marvin (1899), 41 Fla. 221, 79 Am. St. 171-186, ext. n.; Davidson v. Jennings (1900), 27 Colo. 187, 83 Am. St. 49; Turner v. Boger (1900), 126 N. C. 300, 49 L. R. A. 590, n. (is unconstitutional).
Failure to pay money; damages for, are interest.
Interest by way of damages. Ans. Conts. 312; Suth. Dam.; Sedgk. L. C. Dam.
Immunity from liability for, when caused by fraud or gross negligence, is not a lawful subject-matter. § 18, Hughes' Conts., *citing* Maxims: L.C. 352, 354.
For causing death. See *Actio personalis,* etc.; Victorian R. R.
Humiliation and regret no basis for. Linn v. Duquesne Borough (1903), 204 Pa. 551, 93 Am. St. 800 (wife's loss of hands).
Expenses of litigation. Bennett v. Lockwood, *sub* Hadley; Cobbey, Replev. 920-923; Murray v. Lovejoy. *See* MALICIOUS ACTS. Beale, Dam. Cases, 177-192.
Contributions of aid from third persons will not reduce. Nashville R. R., 120 Ga. 453, 67 L. R. A. 87-97.
Change of grade; when actionable. Leiper, 36 Colo. 110, 7 L. R. A. (N. S.) 108-114: cases.

DAME v. WOOD: L.C. 308c.

DAMNUM ABSQUE (OR SINE) INJURIA: A loss without injury. A loss for which no recompense can be obtained. § 63, Gr. & Rud.; Suth. Dam. 3; Ashby: 273; Chasemore; *Ubi jus;* 13 Cyc. 255; 3 Bl. Com. 125 (cause of action). *See* Weltmer v. Bishop. Losses caused by accident are non-actionable. See *Actus Dei,* etc. Or by the lawful exercise of official or of state power. *Rex non potest peccare;* Hill v. Boston. Unbounded immunity is claimed by superior judges. Lange: 159. *Damnum sine injuria esse potest:* A loss without injury is possible. Ashby: 273.

DANS ET RETINENS, NIHIL DAT: One who gives and yet retains does not give effectually. *See* GIFTS.

DANT v. S.: L. C. 212.

DARTMOUTH COLLEGE v. WOODward (1819), 4 Wheat. 518, 4 L. ed. 629, Marshall's Const. Decisions, 297-388, Myer, Vested Rights, 493, Cumming's Private Corp. 490, 2 Thayer, Const. Cas. 1564, Suth. Stat. 555 (*Expressio unius,* etc., applies to corporate powers), 661 (express and implied powers), 662 (contracts inviolable); 1 Kent, 416; Von Holst, Const. Law. 225, Cool., Bish., Torts, Pars., Bish., Page, Conts., Cool, Const. Lim., 2 Wash. R. P.; Beer Co. v. Mass.; Dill. Mun. Corp., Beach, Corp.
Cited, § 26, Hughes' Conts.
Constitutional law; impairing the obligation of contracts. Bronson v. Kinzie: 238. The charter of a private corporation is a contract and cannot be changed or altered by the legislature. But statutes now usually provide for this by an express condition. 35 Wis. 563 (recounting the mischiefs and the dangerous doctrines of the case. Private corporations—their rates may be controlled and prescribed).
Privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts. Clarkesburg Electric Light Co. v. Clarkesburg (1900), 47 W. Va. 739, 50 L. R. A. 142, n.

DASH v. VAN KLEECK: L. C. 237a.

DAVENPORT v. FARRAR: L.C. 2*f*.

DAVIDSON v. NEW ORLEANS (1877), 96 U. S. 97, 24 L. ed. 616; 2 Thayer, Cas. Const. Law, 610; Welty, Assess. 251; Brown, Jurisdic.; Chicago R. R., 166 U. S. 226, 41 L. ed. 369 (instructive case); Marchant v. Pa. R. R. (1894), 153 U. S. 380; Yateman v. King (1892), 2 N. Dak. 421, 33 Am. St. 797, n.
Cited, p. 11, Hughes' Proc; § 93, Gr. & Rud.
Due process of law defined. See *Id.; Audi alteram partem; Coram judice;* Windsor: 1; Wilson v. N. Carolina (1897), 169 U. S. 586, 42 L. ed. 865, ext. n.: cases; Welty, Assess. 250-276; Fallbrook Irrigation

Davidson.—

Dist. v. Bradley (1896), 164 U. S. 112-117. *See* DUE PROCESS OF LAW, Hughes' Proc.

A subject-matter first presented to the federal courts will have purer and stricter rules applied to coram judice proceedings than will be applied when it arose in a state court. Davidson. Consequently there must result a strict and a lax test for *coram judice* proceedings, and each under the Fourteenth Amendment, Constitution of United States. Howard v. Fleming.

This case can be cited to oppose observations under Lampleigh v. Brathwait as to continuity and uniformity of construction of pleadings.

Sequestrating proceedings of a state court without jurisdiction of the subject-matter may pass as res adjudicata. Davidson; Howard. *See* DUE PROCESS OF LAW.

DAVIES v. MANN (1842), 10 Mees. & Wels. (Eng.) 546, 62 R. R. 698, 2 Thomp. Neg. 1105-1108, n.; 19 Rul. Cas. 89; 144 U. S. 408, 429; 134 Fed. 161; 69 L. R. A. 293; Howes' Civil Law, 303; Cool. Torts, 812, Gould, Wat. 92, 128, 1 Wat. Tres. 580, 2 Pafs. Conts. 244, 246, 420, Bro. Max. 385, 388, Whart. Neg. 300, 326, 327, 343, 346, 820*b-h*, Shear. & Red. Neg., Bish. Torts, 463, 464, Bigl. L. C. Torts, 724, Busw. Pers. Inj. 94, 101, 55 N. J. 205, 20 L. R. A. 61; Koons v. R. R., 178 Mo. 511 (Davies, Tuff and Butterfield stated and followed); Holwerson v. R. R., 157 Mo. 216-254.

Davies v. Mann stated: The owner of a donkey fettered it and turned it loose in a narrow lane; it was run over and killed by a careless driver with a fast team, drawing a heavy wagon. With care he could have avoided the act. *Held,* he was liable for the loss.

Contributory negligence is no defense where the injury could have been averted.

R. v. Longbottom (same principle in criminal law); S. v. Lauer (1893), 55 N. J. L. 205, 20 L. R. A. 61; Butterfield; Webb, Pollock, Torts.

Contributory negligence; when no defense. Wilful and wanton negligence that causes an injury is actionable. Under the original compact of society, one must, if possible, protect and not destroy or injure others. Indeed, in many relations one is his brother's keeper. U. P. R. R. v. Cappler. *Sic utere tuo,* etc. The cases show that the original primal right is scrupulously respected and strictly safeguarded. *Salus populi suprema lex;* Bro. Max. 385, 388; Louisville R. R. v. Markee (1893), 103 Ala. 160, 49 Am. St. 21, n.; Thompson v. Salt Lake, etc., Co. (1898), 16 Utah, 201, 40 L. R. A. 172. *Nullus commodum capere,* etc.; *Volenti non fit injuria.* 108 Wis. 339.

Railroads; liability of for negligence to passengers. Kohn v. McNulta (1892), 147 U. S. 238, 37 L. ed. 150, n.

Employes of railroads; contributory negligence of. Note, Kohn, *supra.*

Freedom of plaintiff from, is essential for a recovery. Stokes v. Saltonstall: 207; *Volenti non fit injuria;* Busw. Pers. Inj.

Crossing railroad track; duty of traveler to stop, look and listen. Sweeny; 95 U. S. 161, 24 L. ed. 405, n.; Busw. Pers. Inj.; 69 L. R. A. 681.

The proximate cause is considered. Not-

Davies.—

withstanding the negligence of a plaintiff he may recover if the defendant's negligence was so great as to be substantially the sole cause. Bro. Max. 385-388; Louisville, etc., R. R. v. Markee (wilful and wanton negligence is not excused by contributory negligence). *Nullus commodum capere,* etc.; *Volenti.*

When both parties are negligent the true rule is held to be that the party who last has a clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. Thompson v. Salt Lake Co.; Cincinnati R. R. v. Worthington (1903), 30 Ind. Ap. 603, 96 Am. St. 355, n. (efficient cause sufficient).

Negligence; riding and driving. Davies; Shear. & Redf. Neg. 303-314; Everett v. Los Angeles St. R. R. (1896), 115 Cal. 105, 34 L. R. A. 350-359 (careless bicyclist).

Gross negligence supplies malice. R. v. Longbottom; Ben. & Heard's Lead. Crim. Cas.; 55 N. J. 205; 20 L. R. A. 61.

Illustrations; duty to minimize damage. Smeed. Riding on platform of cars is. Upham v. Detroit City Ry. Co. (1891), 85 Mich. 12, 4 Am. R. R. & Corp. Rep. 160-165, n., 12 L. R. A. 129; Baltimore, etc. Co. v. Cason (1890), 72 Md. 377, 20 Atl. Rep. 113, 4 Am. R. R. & Corp. Rep. 224-229, n.; Fisher v. W. Va., etc., R. R. (1896), 42 W. Va. 183, 33 L. R. A. 69; Lehr v. Steinway, 118 N. Y. 556, 2 R. R. & Corp. Rep. 240-250, n.; 3 Suth. Dam. 940. No excuse that one was there to vomit. Cincinnati R. R. v. Moneyhun (1896), 146 Ind. 147, 34 L. R. A. 141.

Riding in baggage-car will not defeat recovery unless the injury was caused or aggravated by that fact. 43 Minn. 279, 3 Am. R. R. & Corp. Rep. 409, n.

Knowledge of defect or danger. Trying to drive past a hand car left in center of highway, and horses taking fright at this and causing injury, is not necessarily contributory negligence. Ohio, etc., R. R. v. Trowbridge (1890), 126 Ind. 391, 3 Am. R. R. & Corp. Rep. 608-613, n. Disregarding rule of protection; when this will bar a recovery. Chicago, etc., R. R. v. Lovell (1894), 151 U. S. 209, 38 L. ed. 131, n.; St. Louis, etc., R. R. v. Schumacher (1894), 152 U. S. 77. Coupling cars. Northern Pac. R. R. v. Everett (1894), 152 U. S. 107, 38 L. ed. 375, n.

In Lynch v. Nurdin (sub Scott v. Shepherd) contributory negligence of children is considered, and there also Robinson v. Cone is stated, where a child was negligently coasting on the highway.

Law of the road; collisions on the highway. See LAW OF THE ROAD: cases.

Marine collisions also involve the same rationale. Bro. Max. 388. The Majestic (1891), 48 Fed. Rep. 730, 1 U. S. App. 16, 1 C. C. A. 78; Tuff v. Warman, 19 Rul. Cas. 207, n. (Davies, Butterfield rule stated).

Navigation; collision of vessels. See Majestic, *supra;* Belden v. Chase (1893), 150 U. S. 674-706, 37 L. ed. 1218-1229, ref. n.; 34 Hun, 571; 104 N. Y. 86, 16 N. Y. S. R. 28; 117 N. Y. 737; 27 N. Y. S. R. 688; The Umbria (1897), 166 U. S. 404, 41 L. ed. 1053, n.: cases; Nichels v. The Servia (1893), 149 U. S. 144-157, 37 L. ed. 681, n.; The Delaware (1895), 161 U. S. 459, 40 L. ed. 771; Wap. Proceed. *In rem* 515-526; Whart. Neg. 943-952; Bro. Max. 389; Spencer, Marine Collisions.

Doctrine of "last chance." Bogan v. Carolina R. R. (1901), 129 N. C. 154, 55 L.

Davies.—
R. A. 418-465, ext. n.; Thompson v. Salt Lake, *supra;* 134 Fed. 161, 69 L. R. A. 293; Indianapolis Traction (Ind.), 7 L. R. A. (N. S.) 143.
Contributory; pleading and proof of; defendant is charged with. Nash v. So. R. R. (1902), 136 Ala. 177, 96 Am. St. 19, n., *contra* cases; Morgan v. R. R., 159 Mo. 262-299.
DAVIS v. FISH, 1 G. Greene (Ia.), 406, 48 Am. Dec. 391 (Sunday judgments void). *Cited,* § 126, Gr. & Rud. *See* Clem: 2*c*.
DAVIS v. SAUNDERS (1770), 2 Chit. 639 (18 E. C. L. R.), 1 Rul. Cas. 203-369, n. Accidents; what are. *Actus Dei,* etc.
DAVIS v. S. (1878), 38 Wis. 487, 1 Am. C. R. 606. Pleas in mandatory record essential for a trial. S. P. Borkenhagen: 81.
DAVIS v. TURNER (1848), 4 Grat. 422. Burden of proof is upon vendee to show fair dealing in catching bargains, undue influence and fraudulent conveyances. Chesterfield; 1 Chit. Conts. 572, n.; § 110, Hughes' Conts.
DAVONE: *See* Keech.
DAY: Meaning of. Suth. Stat. 716; Bouv. Dic.; Working Days, *Id.;* And. Dic.; 14 Mews' E. C. L. 44-61 (Time).
DAYS OF GRACE. Morrison v. Bailey (1855), 5 Ohio St. 13, Redf. & Bigel. L. C. N. & B. 716, 64 Am. Dec. 632-634, n.; Zane on Banks, 114; And. Dic.; 7 Cyc. 838-875.
Usage. Custom cannot change or oppose a statute. Morrison; Zane on Banks, 114; Noble. *See* COMMERCIAL PAPER.
Checks; not entitled to days of grace. 3 Kent, 88.
DAYTON v. TRULL (1840), 23 Wend. 345, 2 Am. L. C. 250-309, ext. n.; *cited,* Rand. Com. Paper, Danl. Nego. Insts., 2 Pars. N. & B., Suth. Dam., Zane, Banks,
Delivery of bill or note in payment of antecedent indebtedness is only conditional. It may be returned and the original items sued for. Dayton; Tobey. *See* Cumber.
Payment; bill of exchange given in payment; what must be shown if action is brought on antecedent debt for which bill was given. 1 Add. Conts. 333; Tobey; Okie; Hunter v. Moul (1881), 98 Pa. 13, 42 Am. Rep. 610, 21 Am. L. Reg. 514-522, n.; 2 Chit. Conts. 1133-1144.
DEAD. *No jurisdiction can be acquired over. Judgment against, void.* Shea v. Shea (1900), 154 Mo. 599, 77 Am. St. 779, n.
Effect of judgment entered against dead persons. Hygeia Water Co., 72 Conn. 646, 49 L. R. A. 147-153, ext. n.; Cumber v. Wane: 311.
Cannot be disinterred after death. Massie, 131 Ala. 62, 90 Am. St. 20 (accretion to realty).
DEAD BODY. Rights to, and remedies to enforce. Keyes, 119 Mich. 550, 75 Am. St. 423; Bouv. Dic. Selling of, a crime. Thompson v. S., 105 Tenn. 177, 80 Am. St. 875. When subject of larceny. McClain, C. L. 542; 13 Cyc. 266, 282.
DEAD ISSUES. *Will not be reviewed for error.* American Book Co.; California: 270; S. v. Conkling: 109.
DEADLY WEAPON. McClain, C. L.; 1 Am. Crim. Rep. 60, 272; 13 Cyc. 283.
DEAF AND DUMB. Bouv. Dic.
DEATH. Personal injuries die with the person. *Actio personalis,* etc. Bouv. Dic.
Lord Campbell's Act (1846). Cool. Torts, 308, Shear. & Redf. Neg., §§ 127-140, Hughes' Conts.
Its effect in assigning contract of deceased. Ans. Conts. 235, 236; L.C. 309.
Death from wrongful act. Suth. Stat. 570, 571; 2 Kinkead, Torts, 465-480. Proof. 2 Gr. Ev. 278*a*; Nepean. *See* LIMITATIONS OF ACTIONS.
Revokes an agency. Hunt; also a check. *See* COMMERCIAL PAPER. §§ 301, 303, Gr. & Rud.
Proof of. 2 Gr. Ev. 278*a*, 278*b*; Nepean; Sm. Lead. Cas. *See* LIMITATIONS OF ACTIONS.
Judgment may be entered against a deceased person who dies after trial. Actus curia, etc. Cumber: 311; 1 Cyc. 41-45 (abatement); 13 Cyc. 290-387.
One is presumed dead after absence of seven years, if not heard from. Nepean; *see* LIMITATIONS; Francis, 180 Pa. 644, 57 Am. St. 668, n.; Sprigg v. Moale (1868), 28 Md. 497, 92 Am. Dec. 698-708, n.; 2 Best, Ev. 409, n.; Hoyt, 45 N. J. L. 219, 46 Am. Rep. 757-772, n.; 29 Alb. L. J. 426, 464, 488, 504.
Survivorship. Death in same catastrophe is presumed simultaneous. Coye v. Leach (1844), 8 Met. 371, 41 Am. Dec. 518-523, ext. n.; Phene, Trusts, *In re* (1869), L. R. 5 Ch. 183, 39 L. J. Ch. 316, 6 Mews' E. C. L. 576, 577, Thayer, Cas. Ev. 114, 5 Gray, Cas. Prop. 391; notes, Nepean v. Doe, 2 Smith, Lead. Cas. 660, 8th ed.; Wing v. Angrave (1860), 8 H. L. Cas. 183, 8 Rul. Cas. 519-553, 11 Eng. Reprint 397, 6 Mews' E. C. L. 587, 812, 14 *id.* 1676, 1 Gr. Ev. 29, 30; 2 Wh. Ev. 1277-1280; 1 Tay. Ev. 156-160; 13 Cyc. 290; Middeke v. Balder (1902), 198 Ill. 590, 92 Am. St. 284, n.; 213 Ill. 9, 104 Am. St. 190-213, ext. n. *See* SURVIVORSHIP.
Evidence to rebut; presumptions of. Dowd v. Watson (1890), 105 N. C. 476, 18 Am. St. 920, n.
Methods of proving death. Mutual Ins. Co., 91 U. S. 238; 2 Gr. Ev. 278*a*, 278*h*.
Civil death; what is. *See* CIVIL DEATH.
DE BENE ESSE: Conditionally. Bill to perpetuate testimony. 2 Beach, Eq. 1008-1012, 1 *id.* 148-152; 3 Encyc. Pl. & Pr. 329-334; Bouv. Dic. 243, 245, 498.
DEBILE FUNDAMENTUM FALLIT opus: Where the foundation fails all goes to the ground; or, where there is a weak foundation the work falls. Bro. Max. 180, 182, 347, 349, 601, 602, 715. *Sublato fundamento cadit opus;* Windsor: 1; Cruikshank: 232; *cited,* pp. 16, 23, 40; §§ 5*a*, 6, 9, 27, 29, 30, 36, 38, 44, 53, 72, 79, 88, 104, 106, 113, 114, 142, 145, 156, 157, 168, 171, 178, 205, 218, 239, 252, 221, 325, Hughes' Proc., *q. v.*; §§ 63, 89, 108, 114, 125, 163, 186, 192, 201, 201*a*, 224, 229, 313, Gr. & Rud.
Collateral attack, constructive notice, *res adjudicata* and other conserving principles should be considered in reference to *Debile,* etc. §§ 83-123, Gr. & Rud.
Cognate Maxims and Cases: De non apparentibus; Fabula non judicium; Verba fortius; Quod ab initio; Windsor: 1; Horan: 85; Munday: 79; Cooke: 321; Cruikshank: 232; Waverton: 70; Waters: 71; Clem: 2*c*; Guedel: 74*a*; Perez: 2*e* (jurisdiction of subject-matter); Montana: 10*b*; Devine; Cruikshank: 232 (pleadings); Campbell: 2*a* (Mo.); Davenport v. Farrar: 2*f* (Ill.); Roden v. Helm: 12*b* (Mo.); Weltmer: 268*a*; Virginia Coupon Cases: 285*a*; Howard v. S.: 166.
The mandatory record is the foundation of a judgment or a cause of action. See APPELLATE PROCEDURE; Clem: 2*c*.
The assignment of errors limits the use of

Debile.—
the statutory record. *See* ASSIGNMENT OF ERRORS.
An explication of this maxim would be most instructive from many viewpoints; and for contracts it may be observed that if there is absent any essential element, and this is made to appear, the contract fails. Lampleigh: 301.
DEBS, IN RE (1895), 158 U. S. 564-600 (39 L. ed. 1093), 15 Sup. Ct. Rep. 900; Boyd, Const. Cas. 659, 2 Am. & Eng. Cas. Eq. 364-414; And. Am. Law; Eddy, Combinations, *q. v.*
Contempt issues; court tries; enforcement of executive power by judicial process. *See* CONSTITUTIONAL LAW.
DEBT. 2 Gr. Ev. 279-293; 1 Chit. Pl. 121-129; Bouv. Dic.; 5 Mews' E. C. L. 306-330, 1 *id.* 824-868 (Attachment), *id.* 868-908 (Attachment of Debt), 10 *id.* 867-924 (Payment); 13 Cyc. 402-424.
Actions of. Ans. Conts. 38, 39.
DECEIT: Action of, for fraud. Pasley: 375; Chandelor: 374; Laidlaw. See *Caveat emptor;* Bouv.; And. Dic.; Ans. Conts. 137, 163; Bish. 664; 7 Mews' E. C. L. 157-432 (Fraud and Misrepresentation); Ewart, Estoppel; Page, Conts. 132; 20 Cyc. 1-146.
Pasley: Derry v. Peak discussed; Frank v. Shadbolt, 74 N. H. 57, 7 L. R. A. (N. S.) 646 (*scienter;* intention to deceive).
DE CHASTELLUX v. FAIRCHILD (1850), 15 Pa. 18, 53 Am. Dec. 570, n., Gt. Opin. Gt. Judges, 421; Brown, Jurisdic. S. P. Dennett (division of state power).
DECLARATION. Admissions, declarations and entries. 6 Mews' E. C. L. 499-564; Bouv., And. Dic. *Dying.* *See* DYING DECLARATIONS. *Against interest.* 1 Gr. Ev. 147-156; 6 Mews' E. C. L. 492-564; 1 Ell. Ev. 324-475. *Of trust.* 7 Mews' E. C. L. 555-575, 14 *id.* 312. *Declarations as evidence.* Gillett, Indirect Ev. 129-161; Bouv. Dic.; 6 Mews' E. C. L. 520-548; McClain, C. L. 412-415. *Parts of the statement in pleading.* And. Dic.
DECLARATION OF AMERICAN INDEpendence. Demands procedure. § 19, Hughes' Proc. Indictment of the king for his evil administration and establishment of a weak, corrupt and dependent judiciary. *See* Bouv. Dic. § 10, Hughes' Proc.
Grounds of. § 154, Gr. & Rud.
DECOYING. To crime. McClain, C. L. 118, 557. *Volenti,* etc.
DEDICATION. And. Dic. Of highways. Dovaston: 217; 13 Cyc. 434-504.
DEDUCTIVE TEACHING: Pp. 8-17; §§ 1-12, Hughes' Proc.
DEEDS. *See* CONTRACTS; SEAL. Authority to make, must be under seal. Hibblewhite. Contracts to convey land. §§ 137-147, Hughes' Conts. Form of, short deed. § 146, Hughes' Conts.; *see* Bouv.; And. Dic.; 5 Mews' E. C. L. 339-531 (Deed and Bond); Devlin, Deeds; Washburn, R. P.; 2 Whart. Conts. 677-691; 13 Cyc. 519-756. Contracts by. § 32, Hughes' Conts.; *see* Ellis v. Esson: 389.
Essentials of a deed. §§ 32, 146, Hughes' Conts. *Pleading and proof of.* 2 Gr. Ev. 293-300; 14 Rul. Cas. 577-583.
A deed must be accepted. Welborn: 388. Contracts, technical rules relating to. Welborn: 388: cases; Christmas v. Oliver.
To person not in being. Davis v. Hollingsworth (1901), 113 Ga. 210, 84 Am. St. 233-241, ext. n.
Consideration may be shown. Jackson v. Cleveland; Butt v. Smith, 121 Wis. 566, 105 Am. St. 1039. But it can only be impeached for illegality. Collins.
Simple contracts differ from deeds as to formality, dignity, consideration, merger and what may be written on, have longer limitations; the alteration after execution avoids. The distinctions rest upon procedure questions. §§ 36-40, Hughes' Conts.; *Ex nudo,* p. 37 *id.;* 2 Page, Conts. 555-567.
Only party to, can sue upon. 2 Wh. Conts. 784, 788; Cooch. Escrow deed. Welborn: 388; 2 Page, Conts. 583-597.
Registry; law of. Koch v. West (1902), 118 Ia. 468, 96 Am. St. 394-406, n.; Le Neve: 396.
Destroying of, will not revest estate. Ames, 80 Ark. 8, 145 Am. St. 68.
Construction. Heaton v. Hodges, 2 Dev. Deeds, 835-880; Wilkins.
Rights resting on, are more secure than those depending on simple contracts, for the reason that they conclusively import a consideration, and are exclusive as to parties who may sue upon. *See* SEAL; Cooch v. Goodman; Williams v. Bankhead.
Estoppel by deed depends upon sealed matter. § 178, Gr. & Rud.; Christmas v. Oliver; Young v. Raincock; *see* ESTOPPEL.
One accepting is bound by. Christmas. Estoppels are mutual.
The nature and qualities of a deed affect many rules of contract and of procedure.
Quitclaim deeds; effect of, to give notice. Babcock, 25 R. I. 23, 105 Am. St. 848-863, ext. n.
Must convey a present interest. 145 Calif. 694, 104 Am. St. 84, n.
Presumptions in favor of, for convenience. § 53, Gr. & Rud.; *Probatis extremis præsumuntur media;* Bray v. Adams (administrators).
For convenience many things are presumed in favor of deeds. Omnia præsumuntur rite.
Recitals in official deeds may be made prima facie evidence. Bray; S. v. Thomas: 257.
Sheriff's deed rests on a judgment, its record, the execution, levy, sale and deed.
Parties have a right to contract that they will raise no question as to a consideration, nor against recitals in their deeds.
Of parent to child; all presumptions are in favor of; they are favored. McLeod, 145 Ala. 269, 117 Am. St. 41.
DEFAMATION: Newell on. *See* LIBEL; SLANDER; Bigl. L. C. Torts; Bouv. Dic.; *Pollard v. Lyon:* cases; § 313, Gr. & Rud. (cases); 2 Gr. Ev. 410-429; 3 *id.* 164-179; 2 Kent, 16-25 (excellent *resume*); Cool. Const. Lim. 510-570; Suth. Dam.; Sedgk. Dam.; Cool. Torts; Bish. Torts, 251-311; 2 Bish. Crim. Proc. 781-811; 1 Am. Lead. Cas. 87-249: cases; 9 Rul. Cas. 1-185; 15 Am. St. Rep. 318-369; Cowan v. Fairbrother (1896), 118 N. C. 406, 32 L. R. A. 829, ext. n.; 2 Add. Torts, 1087-1173; Folkard's Starkie; 4 Crim. Def. 515-536; Mews' E. C. L. 531-677. *See* TORTS.
Written, most actionable. *Sub* Pollard.
Justification in, must be certain. J'Anson: 91; Rutherford v. Paddock (1902), 180 Mass. 289, 91 Am. St. 282-309, ext. n.
Defenses in; exceptional rules for in codes. These must be consulted. Cooley v. Galyon (1902), 109 Tenn. 1, 97 Am. St. 823-836, ext. n., 60 L. R. A. 139, n. (justification—privilege of witness need

Defamation.—
not be pleaded specially—general issue sufficient).
Bona fide communications; when privileged. Harrison v. Bush. *See* LIBERTY OF THE PRESS. *Candidate for office.* Harrison.
Records of courts cannot be employed for. Sto. Pl. 267-270, 867; J'Anson: 91; Hastings.
Pertinent matter is never scandalous. Sto. Pl. 269; Rosen: 92. *See* SUBJECT-MATTER. *Relevancy, privileges, allegations.* Sto. Pl. 269. See *Necessitas*, etc.
Allegations in pleadings are never libel. Gore v. Condon (1898), 87 Md. 368; 67 Am. St. 352, n.; Hastings; 45 La. Ann. 1184, 22 L. R. A. 649, n.
Clergyman maliciously entering on his record the supposed father of a bastard is liable for. Kubricht v. S. (1902), 44 Tex. Crim. 94, 58 L. R. A. 959, 100 Am. St. 842.
Where both sides are at fault. Golderberg, 46 La. 1303, 28 L. R. A. 721-726, n., *note*, 58 L. R. A. 744; *Mutual vituperation no cause of action.* Bloom v. Crescioni (1903), 109 La. 667, 94 Am. St. 456; *Volenti*, etc.
Pleading; necessary allegations. Privileged one may state the parties in adultery in divorce proceedings. Jones, 161 Mo. 258, 53 L. R. A. 445; Cooley, *supra.* *See* Rosen.
Corporations; defamation of. Brayton, 63 Ohio, 83, 52 L. R. A. 525, n.
By counsel. Hastings. *Privileged communications.* Harrison; Toogood; Bromage.
Jury are judges of law and fact. S. v. Whitmore (1894), 53 Kan. 343, 43 Am. St. 288-295, ext. n. (books may be read to jury); 2 Gr. Ev. 411; Blagg v. Stuart (1846), 10 Q. B. (Ad. & El.) 899 (59 E. C. L. R.), 9 Rul. Cas. 117; *Ad quæstionem facti*, etc.
Code provisions relating to pleadings in defamation. Bliss, Code Pl. 305.
Defenses in. Bliss, Code Pl. 360-363; J'Anson: 91. *Mitigation.* Bliss, Code Pl. 361-363; Warner v. Clark (1893), 45 La. Ann. 863; 21 L. R. A. 16, ext. n.; Cooley, *supra.*
Liability of one for repeating. Brewer, 121 Mich. 526, 80 Am. St. 527, n.; 46 L. R. A. 397, n.
Repetition of. See "Squib Case"; Terwilliger v. Wands, *sub* Victorian Case; De Crespigny. *Defamation of women.* Pollard.
Damages. Sub Victorian Commrs. Case; Terwilliger; Suth. Dam.; New. Def.; Cool.; Bish. Torts.
Of the dead. Atkinson v. Doherty (1899), 121 Mich. 372, 80 Am. St. 506, n. (a person's right of privacy dies with him).
DEFAULTS; SETTING ASIDE: Morrill v. *Id.* (1890), 20 Or. 96; 23 Am. St. 95-119, ext. n.; Cadwallader v. McClay (1893), 37 Neb. 359; 40 Am. St. 496, n.; 6 Encyc. Pl. & Pr. 1-224; Needham; Hayne Appeal, 343, 351.
One in default can obtain no grace or favor of a court. He is in a species of contempt. Refusal to comply with any order of the court constitutes one in default.
Defaults; what is admitted is conclusive. Slater v. Skirving (1897), 51 Neb. 108, 66 Am. St. 445, n. *See* ADMISSIONS.
What default admits. Jordahl v. Berry (1898), 72 Minn. 119; 45 L. R. A. 541, n.; McAllister: 3. Defenses not pleaded are waived.
DEFENCE: *Defences must be pleaded or they are waived.* Gila, 205 U. S. 279; Field: 84; McKyring: 33; Bliss Code Pl.

Defence.—
345; Cromwell: 26; Virginia Coupon Cases: 285*a*; *Contumacia*, etc. *See* ISSUES.
Defences not pleaded are waived. Cromwell: 26; Munday: 79; Bliss, Code Pl. 345; Kollock. *See* SPLITTING CAUSES; *Interest reipublicæ.* § 145, Hughes' Proc.; §§ 49, 53, 278, Gr. & Rud.
Cannot first arise from evidence. See *Accessorium*, etc.; Borkenhagen: 81; Shutte: 291.
Several may be pleaded. Bell v. Brown. *See* STATUTE OF ANN; Bliss, Code Pl. 344; Graver: 103. § 42, Hughes' Proc.
Manner of stating several. Bliss, Code Pl. 346; Haskell: 101.
Affidavits of. See AFFIDAVIT OF MERITS; L.C. 103.
Need not be anticipated. Ferguson v. Crawford: 264. *See* ANSWER.
Want of intent as a defence in criminal cases. McClain, C. L. 110-128. *Actus non facit reum*, etc. *See* Bouv.; And. Dic.
DEFENDANTS: *Charged with intelligence and with duties as well as plaintiffs. Ignorantia legis*, etc.; L.C. 79; *Non obstante veredicto;* Skeate: 82; J'Anson: 91; *Ubi eadem*, etc.; *Ambiguum placitum*, etc. § 98, Hughes' Proc.
Defendants are most favored; for no one is presumed a delict before he is alleged and proved such. *Actore*, etc.; *Semper præsumuntur pro negante; Ei incumbit*, etc.; *Reus excipiendo; Favorabiliores*, etc. No duty or burden rests on a defendant until he is alleged a wrongdoer. *De non apparentibus*, etc. Every presumption is against a pleader. And afterward he has only to meet and overcome the preponderance of proof.
The protection of a defendant is greatly reinforced by rules springing from the conserving principles of procedure. What concerns these are never foreclosed, but may be raised on collateral attack, as well as at intermediate stages. Assent—consent—waiver—acquiescence—by a defendant will not estop him in relation to those matters, which may be raised and will be available at all times in his behalf. Windsor: 1.
Must make and look to their issues. Munday, Borkenhagen: 79, 81; *Contumacia*, etc.; 86 Miss. 565, 109 Am. St. 722 (statute may require specific statement beyond the general issue).
Reus excipiendo fit actor: The defendant by a plea becomes plaintiff. *Non debet actori licere, quod reo non permittitur.* By appealing the defendant becomes the actor; the burden is upon him. McArthur v. Howett: 99.
DEFINITIONS: *See* CONSTITUTIONALISM; SUPREME LAW; INTRODUCTION, Hughes' Proc.
Conserving Principles of Procedure, §§ 83-104, Gr. & Rud.
Tests of an adjudication defined. *Audi*, etc.; *Coram judice;* COLLATERAL ATTACK; *Debile.*
Certainty. *See* CERTAINTY.
Due process of law. See *Id.*
Due process of law record. See *id.;* COMMON LAW RECORD; MANDATORY RECORD.
Pleadings. § 1, Hughes' Proc.
Statutory record. *See* BILL OF EXCEPTIONS.
Contracts. *See* LEADING CASES 301-416.
DEFRESE v. S. (1870), 3 Heisk. 53, 1 Am. Cr. R. 1, 1 Green, Cr. R. 522. System to prove intent.

DEHM v. HINMAN (1888), 56 Conn. 320, 322, 1 L. R. A. 374; Buller, Nisi Prius, 23; 6 Bac. Abr. Tres. 23.

Officers must return process, else they can have no protection under it. Six Carpenters' Case; 77 Am. St. 310. Records are required for the protection of officers.

One aiding an officer to arrest is not liable as a trespasser ab initio because the officer fails to return process. Cited, § 27, Hughes' Proc.

DEITSCH v. WIGGINS (1872), 1 Colo. 299, 15 Wall. 547. Justification pleas—what sufficient; informal, plea waived. Informal assignments of error unavailing. *Cited,* § 53, Gr. & Rud.; *see* L. C. 290-299.

DELAMAR v. HURD (1874), 4 Colo. 442. Seal of judge essential to validity of statutory record, where required by statute.

DELANO v. JACOBY (1892), 96 Cal. 275, 31 Am. St. 201. *Specific statements control general denial.* Crater v. McCormick, *Verba generalia,* etc. *See* DENIALS.

DELAY. Its mischiefs in the due administration of justice. 14 Mews' E. C. L. 1715-1777; Waco Case; §§ 152, 154, Gr. & Rud.

DELEGATUS NON POTEST DELEGARE: A delegate or deputy cannot appoint another. Story, Ag., § 13; Reinh. Ag. 187. See *Delegata,* etc.

Trustee may act by his agent, when. Gates, 173 N. Y. 426, 93 Am. St. 608-616, n.

DELIRIUM TREMENS: U. S. v. Drew.

DELIVER: *See* SALES; STATUTE OF FRAUDS; Bouv. Dic.; 12 Mews' E. C. L. 382-626 (sale of goods); 6 Cyc. 1053-1060 (chattel mortgages); 2 Page, Conts. 577-597. *See* DEEDS; L.C. 388.

DEMAND: Roberts v. Orchard (1863), 2 H. & C. 769. *Generally, notice or demand before suit is unnecessary.* § 250, Hughes' Proc.

A debtor must seek out and make tender to his creditor. Toms v. Wilson (1862), 4 B. & S. 442-455 (118 E. C. L. R.).

Wherever a demand is necessary, it may be waived, and exactly as other waivable matter. Wells on Replev. 309. But to this there are exceptions. 4 Encyc. Pl. & Pr. 657-659.

It is waived if it obviously was unavailing. 204 U. S. 522.

Bringing suit is a demand. 80 Am. Dec. 250. Even on a demand note. Statutes often affirm this rule. *See* TENDER.

When necessary must be averred. Bliss, Code Pl. 287c; Denton v. Fyfe, 65 Kan. 1, 93 Am. St. 272 (Partition—Demand for possession).

When unnecessary in replevin and trover. R. R. v. O'Donnell (1892), 49 Ohio St. 486, 34 Am. St. 579, n.: cases; Rosum v. Hodges (1890), 1 S. Dak. 308, 9 L. R. A. 817, n.

That a claim was not presented to a county board may be waived, and is waived if not aptly objected to. It is too late to raise it on appeal. Auerbach, 23 Utah, 105, 90 Am. St. 785.

Demand for damages; prayer. See Russell v. Shurtleff; 2 Suth. Dam. 415 (essential for judgment by default); *Ad dammum. See* Bouv.; And. Dic.

DE MINIMIS NON CURAT LEX: The law does not concern itself about trifles. Bro. Max. 142-147; Sto. Pl. 500, 501, 549, 820; 13 Cyc. 12, 779, 781; Hughes' Proc. 553-556; *cited,* §§ 116, 140, Hughes' Conts.

Cited, §§ 29, 44, 101, 109, 165, 167, 174, 204, 205, 264, 328, 344, 345, Hughes' Proc.; §§ 63, 96, 177, 206, 256, Gr. & Rud.

De Minimis.—

Leading cases: Windsor: 1; Ashby: 273; Bristow: 135; Flournoy: 146.

What is material error is important in appellate procedure. A court will only reverse for material error. Hughes' Proc. 555; L.C. 290*a*-296.

Where judgment is for right party, this will condone error. Williams v. Mitchell (1892), 112 Mo. 300; Brobst v. Brock, 10 Wall. 519; *Cavendum est a fragmentis.*

DEMURRER: Functions of the general demurrer are constitutional. §§ 88-90, 201*a*-202, 238, 250-255, Gr. & Rud.

It cannot be waived. §§ 128, 130, 162, 203, 238, 251, 252, 275, Gr. & Rud.

Codes provide for. §§ 162-164, 202, 238, Gr. & Rud.

The general demurrer is a first stage of objection, another is, the motion in arrest, and the last is upon collateral attack. See Campbell v. Porter: 2; McAllister: 3; Rushton: 5; Garland v. Davis: 60; Hitchcock: 12; *also* Campbell v. Greer: 2*a*; Roden: 12*b* (Mo.); Davenport: 2*f* (Ill.); Fish: 12*c* (Ill.); Perez v. Fernandez: 2*e* (U. S.); Cruikshank: 232; American Car Co. v. Hill (1907), 226 Ill. 227-232 (may be first raised by an instruction).

See *De non apparentibus; Quod ab initio; Debile;* AIDER; ALLEGATIONS; CAUSE OF ACTION; *Frustra probatur quod probatum non relevat;* Hughes' Proc. 556-560.

Demurrers raise questions of law upon the record in contradistinction to questions of fact. The former the court must decide, the latter the jury may pass upon. See *Ad quæstionem,* etc.

Under all systems the general demurrer is and must ever be substantially the same. There is no room for diversity in reason. Under some name and in some form it must exist. It is a juridical means that legislatures cannot abolish; for courts must, in the nature of things, in a constitutionalism, inquire after the *cause of action,* the *wronged* party or parties and the *wronging* party or parties. These observations are made to give necessary and fixed views. §§ 7-12, Hughes' Proc.

A general demurrer is not waived; "It will keep." Mallinckrodt: 12*a*; Campbell v. Greer: 2*a*; Campbell v. Porter: 2; 226 Ill. 227; U. S. v. Cruikshank: 232; *See* Great N. R. R. v. S., 208 U. S. 452.

Must be verified in equity. 149 U. S. 574.

Forms. Foster's Fed. Prac. 1305.

Observations on. Bissell: 42.

Overruling general demurrer will keep without exception. Benton; Sto. Pl. 10, 473; Campbell: 2; Mallinckrodt: 12*a*.

Cannot plead and demur at the same time. Auburn: 9; DUPLICITY; ELECTION.

Res adjudicata. Judgment final on, as if on proof. Bissell: 42; N. P. R. R., 205 U. S. 122, *citing* Bissell; Cromwell: 26.

DENIAL: In pleading. A traverse of the statement of the opposite party; a defence. L.C. 34-44. Necessity for. §§ 49, 71, 165, 198, 272, 275, 278, Gr. & Rud. Failure to deny is an admission. §§ 198, 278, Gr. & Rud.

No denial, no trial. §§ 272, 276, Gr. & Rud. Admissions leave nothing to try. § 272, Gr. & Rud.

Certainty of required. § 276, Gr. & Rud.; L.C. 34-44.

For a denial there must be a sufficient allegation of a fact, or a material fact properly pleaded. Relating to this is a bewilderment of discussions. *See* ALLEGATIONS; CAUSE OF ACTION; ISSUES.

Further, the denial must be in certain, positive and unequivocal language, in the

Denial.—

proper record, agreeably to the rule, "what ought to be of record must be proved by record, and by the right record." What is not juridically presented cannot be judicially considered. A plaintiff must allege, and a respondent must either demur, or admit, or deny, and he must deny with certainty, *bona fide* and without covin and chicane. Ambiguous, sham and false pleadings are inimical to the conserving principles of procedure. §§ 83-123, Gr. & Rud.; *Dolus versatur in generalibus.*

The issue depends upon such allegations and denials. Upon these depends jurisdiction. Brown v. City.

Codes provide the place the denials shall appear, thus: An answer shall have: 1st, denials; 2d, plea of new matter; 3d, counterclaim. They should not be commingled with affirmative allegations. This fault is a formal one and will be corrected upon proper application.

Of every material allegation there should be either an admission or a denial, and it is the duty of the court to define which.

Wherever pleadings are to limit issues, narrow proofs, speed the determination of causes upon their merits, and serve the dominating policies in the due administration of justice (such as requirements for appellate procedure, objections upon collateral attack, *res adjudicata,* due process of law, constructive notice, expedition and certainty), there must be the specific and certain denial already mentioned. For the conservation of the great ends mentioned, courts have inherent powers. If new matter is presented in a replication, on principle a court may order it denied or admitted. Economies in the due administration of justice are authority for this view. The reason and nature of a subject-matter often expand a statute. Kollock; *Lex non exacte.*

Defences not pleaded are waived. *See* DEFENCE.

In equity denials must be full, positive, specific and conscientious. Dinehart v. Lafayette: 279; Poor v. Carleton: 37; Minturn v. Seymour; Cole Co.; Shricker v. Field (Iowa); *Quod per recordum; Exceptio falsi,* etc.; *Posito,* etc. In equity and under codes. Dinehart; Burnley. If under oath they weigh as a witness in equity. *Sub* Bonnell v. Wilder: 185. *Codes are founded on equity rationale.* Bliss, Code Pl. 3, 138, 141, 142.

Must be true, bona fide. Graver: 103; Humphreys: 38. *See* SHAM PLEADINGS. *Pleadings must be true.* P. v. McCumber: 110; And. Dic. 329; 73 Conn. 662.

Bona fide denials required. P. v. McCumber; Humphreys; Graver; And. Dic. 329; Garland v. Gaines: 40. *Necessity for.* §§ 22, 36, 325, Hughes' Proc.

Denials of "each" and every "material" allegation insufficient. Montour. *See* Garland: 40, for strict rule. *Dolus versatur in generalibus.*

Specific and certain. Doll v. Good; Higgins v. Wortell (precise and certain). *See* Bell v. Brown; Piercy v. Sabin; 84 Am. St. 182. *Should be certain and positive.* Doll; San Francisco Gas Co. v. San Francisco; 84 Am. St. 182.

Must be certain, neither too broad nor too narrow. Bowlus: 100; 1 Chit. Pl. 345; And. Steph. Pl. 139, 140 (Tyl. ed. 238-241). *See* TOO BROAD. *Dolus versatur.*

Must be material, specific and certain. Bro. Max. 629; Piercy; Siter v. Jewett (what is sufficient in California—Doll; Higgins).

Injunction answers to dissolve. Denials must be certain, etc. Poor: 37; Cole Co.; Shricker v. Field; U. S. v. McAllister; Minturn; Dinehart.

On information and belief. Humphreys; Sto. Eq. Pl. 854, 855, 855*a*; Graver: 103; Bliss, Code Pl. 326: cases; Garland: 40. § 40, Hughes' Proc.

Particulars charged must likewise be denied. Sto. Pl. 806, 851, 854, 855; Graver. *See* FRAUD.

Material allegations, if denied, must be proved with certainty. Citizens' Ry.: 186.

In the criminal case, trial proceedings are coram non judice, unless a plea of not guilty was first entered upon the mandatory record (Crain v. U. S.), and likewise in a civil case. Munday: 79: cases. Without proper *allegata,* essential record matter, all evidence admitted is incompetent—is surplusage. L.C. 291.

A plaintiff is charged with making a proper foundation for a recovery, and likewise a defendant in showing why he should be heard. See ALLEGATIONS. On principle, a defendant should be held to as great strictness as is a plaintiff, and therefore double, ambiguous, equivocal, indefinite and uncertain denials form no basis for proceeding. No trial should be ordered upon them. Until a record is certain, there are no merits to proceed with. Ordering a trial upon no certain or definite issues or upon assumed issues should be enjoined by prohibition and judgment directed by *mandamus* where courts disregard record authority, and usurp power, and by this cause delay, expense and multiplicity of suits. Where there are no sufficient denials, judgment should be entered as a ministerial act, and such should be speedily enforced. A court abuses its powers, and, too, the division of state power, when the record calls for the exercise of the judge's act and this is withheld, and, instead, trial is ordered, a jury called and a trial enforced without warrant or authority. Adams v. Gill.

The foregoing observations apply irrespective of whether or not a pleading is verified. Of course if a denial is false, it is not only base and mean and sham, but it is perjury as well. Such verification is only aggravation by way of addition. In the due administration of justice all pleadings ought to be true, whether verified or not. And, therefore, it is regrettable that some courts, in enforcing the strict rule, make mention of the pleadings as verified for this impresses beginners and "case lawyers" with the idea that a stricter rule is enforced when a pleading is sworn to, while such is not the rationale.

From the above views the importance

Denial.—
of the denial may be gathered; also from cases like *Dickson:* 34.
Every presumption is to be made against the pleader. Verba fortius, etc. Denials should be construed strictly. Mutual Life.
An insufficient denial raises no issue and stands for an admission. Garland: 40 (Connecticut rule borrowed from the English Judicature Act); Boston Lead Co. v. McGuirk (1860), 15 Gray, 87, Shipp & Daish, Cases Pl. 385; *Negatio duplex est affirmatio; Placita negativa duo exitum non faciunt; Qui non negat fatetur.*
A court will examine an entire record and from it gather admissions and give effect to. Dickson: 34; Seattle Bank: 36; McLaughlin: 31. § 325, Hughes' Proc.; McAfee v. Reynolds; Cothran.
Denials must appear from the mandatory record, e. g., a plea of not guilty from the court record; in civil cases, from pleadings filed with the clerk. Munday: 79: cases; Borkenhagen: 81; Russell: 27. *See* DUE PROCESS OF LAW RECORD.
Aider of defective denials. Tynan v. Walker. Kinds and essentials. Bliss, Pl. 232-334; And. Dic. 329; L.C. 34: cases (inconsistent); L.C. 38: cases (upon information and belief).
DENNETT, PETITIONER (division of state power): L.C. 145.
DE NON APPARENTIBUS ET NON existentibus eadem est ratio: Where the court cannot take judicial notice of a fact, it is the same as if the fact had not existed. Bro. Max. 163-165.
Max. No. 2, §§ 78-85, Hughes' Proc.
Cited, pp. 2, 5, 6, 11, 14, 15, 16, 18, 22, 26, 29, 41; §§ 1-10, 13, 16-24, 28, 29, 31, 38, 48, 49, 51, 67, 78, 79, 82, 83, 85, 87, 88, 92, 106, 116, 120, 122, 124, 126, 144, 152, 157, 169*a*, 171, 183, 185, 186, 187, 205, 207, 214*a*, 216, 218, 222, 227, 238, 242, Hughes' Proc.
Cited, §§ 24, 33, 39, 40, 56-60, 88, 89, 93, 99*a*, 101-104, 108, 109, 114, 122, 124, 142, 144, 149, 156, 164, 175, 192, 201, 203, 206, 216, 232, 267, 268, 270*a*, 272, 274-279, 286, 293, 297, 313, Gr. & Rud.
Leading cases: Cruikshank: 232-233; Huntsman: 231; Rushton: 5; Moore: 21; Hanford v. Davies: 86; Craswell: 10; Continental Ins. Co.; Benton; Starbuck: 263; Bristow: 135; Gentry: 88; Galpin: 63; Hannah: 128 (statutory tribunals); Russell: 87 (inferior tribunals); Walker v. Turner: 118; White v. Wagar: 130; Piper: 114 (justice's court); Deputron: 121 (tax deeds); Crepps: 113 (inferior tribunals); Insurance Co.: 157 (bill of exceptions); Lanfear: 181; Olive: 182 (judicial notice—limitations); 22 Encyc. Pl. & Pr. 997, 998 (aider by verdict).
A corollary of Verba fortius: The mystic rule of a constitutionalism. *See* CONSTRUCTION; CODES; §§ 99*a*, 223*a*, Gr. & Rud.
Chief principle of the unwritten constitution. §§ 118, 224, Gr. & Rud.
What is not juridically presented cannot be judicially considered. §§ 56-61, 118, 163, 270, 274, Gr. & Rud.; *Frustra probatur,* etc.; Montana; Smoot's Case; Cruikshank; L.C. 1-21, 69-85. *See* CONSTRUCTION.
Allegations—description essential. Lampleigh: 301: notes. INTELLIGENCE; JUDICIAL NOTICE; *Non potest adduci,* etc.; *Quod constat clare non debet verificari; Actore non probante reus absolvitur;* Cruikshank; *Fabula non judicium.*
Evidence must correspond with and rest upon, else it is irrelevant and cannot be considered. L.C. 291; Rushton: 5: cases; *Non potest probare,* etc.; *Actore,* etc.; *Debile fundamentum fallit opus. See* DEPARTURE.
Prominent cases introducing and discussing the principle. Cruikshank; Windsor; Campbell v. Porter; Campbell v. Greer; Rushton; Wheatley; Moore v. C.; R. v. Goldsmith; R. v. Perrott; White v. Wagar; Howard v. Fleming.
Codes reaffirm the principle in De non apparentibus, etc. Eddy Co.: 136; Green: 90; Kewaunee County: 29. *See* CODES.
There are limitations of judicial notice, of aider, of waiver and liberal construction. Sto. Pl. 10, 473. See *Verba fortius; De non apparentibus,* next presented.
As it is discoverable in Cruikshank, so it appears in Wheatley, and in Chaps. 25, 26, Acts of the Apostles (Paul's Trial before Festus and Agrippa). From such discussions appears the postulate we so often affirm, *i. e.,* that a study of procedure is a study of government. Blake; Cruikshank; §§ 46-49, 79, Hughes' Proc.
This maxim is inseparably connected with the 14th conserving principle, which relates to the requirement of a record, and which is indispensable in a constitutionalism.
Probably no great maxim is more disparaged and obscured than De non. About it great courts, authors, lawyers and reviewers are astonishingly inconsistent, as appears from their decisions, texts, arguments and reviews. These will remind the student of what Kent observed of the discussions of Shelley's Case; Dovaston. All who accept the extreme views of waiver and the theory of the case are in opposition to the maxim, and also to the rule, "what ought to be of record must be proved by record and by the right record."
Consistent views of this maxim unfold great and clearing extents of procedure. Wherever this is definite and certain, there must be a mandatory record to found and to evince the proceedings for all those high ends and policies which must be established and maintained by every system of enlightened and protecting jurisprudence. The requirements for this have existed throughout all ages, and must ever be the same. Those who deny it drift into a mire of absurdity and contradiction.
At no age of navigation was there a safe and useful boat without a bottom, nor can there ever be. And so it is in jurisprudence. A *coram judice* proceeding must, like the boat, have a bottom—a record which is essential to protect the proceedings from collateral attack. Windsor; Cruikshank.
That record which maintains and serves all the conserving principles of procedure may be figuratively likened to the bottom of a ship. That record must ever be tested by the maxims, "Every presumption is against a pleader," and *De non apparentibus,* etc.
This underlying maxim of a constitutionalism, and its essential means, the record required, for the best and only evidence, are of tremendous import in government,

De Non Apparentibus.—

De Non Apparentibus.—

and far more than is generally recognized. Justinian alarmed and aroused the resentment of his liberty-loving subjects by tampering with the maxims so as to enlarge his prerogatives. The annihilation of the greatest maxim of protection of law and of order in American states draws no public attention whatever. Elsewhere is mentioned the fact that a judgment may have any one of seven kinds of matter for a foundation. No greater attack upon jurisprudence can be shown than to demonstrate that fact.

This maxim and the record, constituting the best and proper evidence, far outweigh for protection and stable government the induction into executive offices of great, brave and patriotic incumbents, who have no conception of the life force of government.

All history shows that loyalty is the return for protection; also that courts and taxing powers inject more insidious causes for revolt and resentment to government than all other causes combined. Consequently arises the propgsition that good government depends upon the judiciary, its *coram judice,* its due process of law proceedings, and its protection in accordance with the principles of a constitutionalism.

The scheme of government depends upon its courts far more than is popularly comprehended; executives have the least to do with it.

Only courts understanding De non apparentibus, etc., and the record for the best evidence can give a constitutional government.

Good government depends upon its jurisprudence, not its politicians and governors. *See* GOVERNMENT; *Cujus est instituere,* etc.; *Jus nec inflecti,* etc.; Hughes' Proc.

A leading rule of Res adjudicata is: Estoppels are odious, and therefore, one who claims an estoppel must allege and prove it. It must appear in allegations; if this is not denied it is admitted, and is thus established; if denied, it must be proved by evidence *aliunde* and thus established. In any event, there must be *allegata* and *probata* to protect a judgment from all the attacks it may be subjected to. *Actore,* etc.

In Res adjudicata it must be alleged inter alia that the judgment was between the same parties, and involved the same matter. Greeley. Also, that it was final on the merits, and is not appealed from nor superseded. *See* CONTINUITY. If any of the necessary allegations are omitted it is presumed that they do not exist. L.C. 42.

For the purpose of best introducing *De non apparentibus,* etc., we may observe that every demand of a claimant is presumed against—that recoveries are not favored until their right is made to appear by sufficient allegations. *Actore,* etc. The most prominent and greatest of cases justify these views. Wheatley; Cruikshank; Rushton; Aiken v. Southern R. R. (1903), 118 Ga. 118, 62 L. R. A. 666. *Favor-*

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abiliores rei potius, etc.; *Actore,* etc.

Courts will supply no essential fact; will presume nothing that a party should allege, and which, if alleged, would not be stricken as surplusage. "What ought to be of record," etc. Iverslie: 46: cases.

A complaint shall state a cause of action. Filing an answer will not waive omissions in a complaint. *See* CODES; DEMURRER. That requirement is never waived; to enforce it is the rule that the general demurrer searches the whole record and attaches to the first fault. Sto. Pl., § 10; Bliss, Code Pl. 422 (motion for judgment on the pleadings searches the whole record. 23 Colo. 425). All relief must be within the facts stated. *Verba fortius,* etc.

The inspiration of *De non apparentibus,* etc., was preached by Paul as a part of his new dispensation, and as he outlined it, and claimed protection under it, it was accepted by Festus and Agrippa, who were moved by the marvelous and profound knowledge of the great lawyer-preacher. And, for his protection, those great jurisconsults firmly applied that principle, not only to protect Paul, but to educate the sanguinary Scribes and Pharisees as well, of the morals in "the manner of the Romans." They required *De non,* and *Actore,* etc. These maxims are beacon lights in enlightened, merciful jurisprudence. They deserve requisite attention.

Judicial notice cannot be taken of everything, for what ought to be alleged must be alleged. "What ought to be of record must be proved by record." Material facts will not be implied. Moore; Waters. *E. g.,* the *corpus delicti* must be alleged and proved when the charge is a felony. Matthews v. S. A pleading is always—at all stages—construed alike, and always against the pleader. Dovaston; *Verba fortius,* etc.; notes to Lampleigh. *See also* rule in R. v. Goldsmith; Waters; Bro. Max. 182; Wheatley; J'Anson; Russell v. Mann; notes, C. v. Roby.

This maxim is a cognate of *Actore non probante reus absolvitur.* Bristow: 135.

Upon respect for and vindication of those maxims depend protection from courts, and of course a definite theory of procedure and all that depends upon it.

All merciful, just, moral, certain and protecting systems must apply and uphold those maxims. Paul contended for and Festus announced them with unsurpassed brevity, force and clearness. (Chs. 25, 26, Acts of the Apostles.) Mr. J. W. Smith introduced them under *Rushton* and *Bristow,* both decisions by Mansfield, and Kent set out and followed *Rushton* in *Bartlett v. Crozier:* 6. Prof. Greenleaf wrote very important text upon the rule of *Bristow,* and cited it to support § 63, 1 Gr. Ev. In the sixteenth edition of that work, we are instructed that that section is now obsolete.

But *see* Bristow, J'Anson v. Stuart (same strict rule applies to all pleadings —to answers and pleas); *Debile funda-*

De Non Apparentibus.—
mentum failit opus. See pp. 29-32, Hughes' Proc.

It seems proper to observe in this connection that *De non apparentibus*, etc., is also denied. *See* Hume; THEORY OF THE CASE; 2 Thomp. Tri., §§ 2310, 2311 (pleadings, like any other notice, may be waived); And. Steph. Pl., § 230; cases, 2nd ed.; Ell. App. Proc. 717.

Codes reaffirm these maxims. See CODES; Dovaston: 217; Bristow; Rushton. However, much can be cited to the contrary.

The supreme court of the United States, with the least exception, congruously respects and vindicates them, as may be discovered in Cruikshank: 232; Windsor: 1; Hanford: 86: Garland: 60; Campbell: 2; and Deputron: 121; Pettibone v. U. S. (1893), 148 U. S. 197.

See *Cooper v. Reynolds;* Gentry v. U. S. (Ct. of Appeals, which is not so strict about answers or pleas as was Mansfield, who held that defenses not pleaded are waived); J'Anson.

In Mansfield's court, not even a governor could raise or rely upon or present a defense not pleaded. (Mostyn.) It is now far otherwise in some of our American courts.

In some of these, both delictions and defenses exist only in wild and extravagant dicta, and are, in fact, unfounded—are a tyrannous abuse of power, as a careful examination of opinions will show.

As a safeguard against usurpation and its insidious attacks, civil liberty has no greater or more important conception than is expressed in *De non.* It is most instructive to trace and view it from the small and commonplace rules it molds and founds, up to and into the profoundest constitutional conceptions of protection. It is a great, fundamental, underlying conception of "due process of law." It affords one of the technical tests of what relates to *Audi alteram partem,* and of *Res adjudicata*—former jeopardy. Those great maxims and their cognate cases—*Wheatley, Rushton, Bristow, Windsor and Campbell v. Porter*—are the roots of great, original, primal and fundamental conceptions of protection—of constitutional law.

The keys or clues which lead to this most important and significant explication are *Wheatley, Campbell, Cruikshank* and *Windsor.* From this we may discover why *pleadings ought to be certain* (Waters; Moore), and why the ground of the *general demurrer searches the whole record and attaches to the first fault. See* DEMURRER; §§ 7-12, Hughes' Proc.

De non apparentibus, etc., applies in appellate procedure. Planing Mill Co.: 2*d.* Unless the abstract shows that the motion for the new trial and the statutory record were filed in time it will be presumed that they were not. *Verba fortius;* Dovaston; Fost v. Gray, 105 Mo. Ap. 694.

The motion, the record and the assignments of error are jurisdictional. 105 Mo. 696 (court cannot proceed without).

DENTON v. GREAT NORTHERN R. R. (1856), 5 El. & Bl. 860 (85 E. C. L. R.); 34 Eng. L. & Eq. 154; Thomp. Lead. Cas. Pass. 52; 3 Mews' E. C. L. 52; 7 *id.* 372; 2 Add. Torts, 63; Le Blanche; 3 Mews; 1 Sedgk. Dam. 218; Ans. Conts.

Denton.—
34; 2 Pars. 253; Hutch. Carr. 604; Hansley v. Jamesville R. R. (1894), 115 N. C. 602; 117 N. C. 565, 32 L. R. A. 543.

Liability for detention of a passenger. Le Blanche.

Strikes will excuse a common carrier for delays. 40 U. S. App. 157, 35 L. R. A. 623-633, ext, n.: cases.

Railroad ticket is contract. Cherry.

DENVER & R. G. R. R. v. RYAN (1889), 17 Colo. 98, 104.

Notice of intention to seek a review must be given and the exception for this must affirmatively appear in an exceptions record. The due administration of justice demands such notice, and a statutory command cannot dispense with that notice. Also notice must be given in a capital case. Smith v. P. (1869), 1 Colo. 121; Miller v. P. (1896), 23 Colo. 95. But not in a divorce case. Gilpin v. *Id.* (1889), 12 Colo. 504; nor where instructions were considered faulty. No. 5 Min. Co. v. Bruce (1879), 4 Colo. 293. The court will not require that such notice be given in all cases alike; that even an appellee must take and note and preserve and assign exceptions. McCoy v. Wilson (1885), 8 Colo. 335-359. Against express waiver, the court requires such notice. Breeze.

This case, in effect, holds that the *mandatory record* cannot be augmented by statute. This is unsound. But the court has held repeatedly that the *mandatory record* may be diminished or wholly omitted by waiver. Hume.

Progressive and defensible enactments are construed away on one hand and the spirit and reason of fundamental rules are disregarded for the letter on the other. *Cujus est.*

DEPARTMENTS OF GOVERNMENT: *See* DIVISION OF STATE POWER; Suth. Stat. 2, 11.

DEPARTURE: There shall be no departure is a commonplace rule of great significance. A departure would breed variances; these are forbidden by the maxim, *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged). A court cannot depart from its record; it is bound by its record. A departure arises from the pleadings, a variance from the evidence. Departures and variances are inimical to the conserving principles of procedure. §§ 83-123, Gr. & Rud. Departures are offensive to those principles. § 182, Gr. & Rud.

The rule is discussed. §§ 76, 108, 158, 182, 219, 223-225, 237, 239, 245, 272, 273-279, Gr. & Rud.

There is no *dictum* or irrelevant evidence where the theory of the case is imposed.

Continuity of jurisdiction is essential. Garland: 60. *See* CONTINUITY. The rule opposes the theory of the case as dispensing with the pleadings. 2 Thomp. Tri., §§ 2310, 2311. If pleadings can be waived there are no collateral issues. 1 Gr. Ev. 459, 460, 545, 565; *Quod ab initio*, etc.; Austin R. R. v. Cluck; 13 Cyc. 787: cases. *See* REPLY.

DEPEAU v. WADDINGTON (1840), 6 Whart. 220, 36 Am. Dec. 216, 2 Am. Lead. Cas. 146-245, ext. n.; Danl.; Pars.; Rand. Com. Paper; 2 Whart. Ev. 1060 (pre-existing debt a good consideration for commercial paper; Swift). *See* Cumber. Consideration for a contract; general discussion. Depeau.

DEPOSITARIES: 13 Cyc. 794-820.
DEPOSIT IN COURT: 13 Cyc. 1030-1042.
DEPOSITIONS: Objections to, if formal, must be aptly made. Duvall v. Ellis; *Consensus;* Bibb v. Allen (1893), 149 U. S. 481; Northwestern Fuel Co., 139 U. S. 218; cases; Shutte; 1 Gr. Ev. 320-325; 1 Whart. Ev. 181-184, 609; 5 Am. & Eng. Encyc. Law, 581-621; Weeks on Dep.; 6 Encyc. Pl. & Prac. 471-642; 13 Cyc. 822-1029.
May be made when case is called for trial. 107 Ala. 412, 54 Am. St. 101, n. (rules of court should require timely objections). Precise parts must be objected to and be so stated that the parts objected to will be certain in the appellate court. 106 Ala. 84, 54 Am. St. 22. *Consensus,* etc.
Inadmissible, when. 12 Tex. 54, 62 Am. D. 513, n.
De bene esse testimony. 2 Beach, Eq. 1008-1012; 1 *id.* 148-152. Bills *de bene esse.* 3 Encyc. Pl. & Pr. 329-334.
Depositions in U. S. courts. 1 Bouv. Dic. 548.
In criminal cases, is statutory. 7 Am. Crim. Rep. 452. Justice of the peace amending defects in. *Id.* 568.
Forms for taking. 2 Foster's Fed. Prac. 1312-1314.
Are taken for convenience. § 53, Gr. & Rud.
DEPUTRON v. YOUNG: L. C. 121.
DEPUTY: *All ministerial officers may appoint deputies. A constable may.* Taylor v. Brown (1854), 4 Cal. 188, 60 Am. Dec. 604; Mech. Pub. Off. 569; 4 Crim. Law Mag. 196; Jobson v. Fennell (1868), 35 Cal. 711; Mech. Ag. 193. *See* DIVISION OF STATE POWER; 1 Bouv. Dic.; And. Dic.; 7 Cyc. 247-254.
In whose name, act. Wilkerson v. Dennison, 113 Tenn. 227, 106 Am. St. 821-831, ext. n.
DERBY v. GAGE (1865), 38 Ill. 27. § 126, Gr. & Rud.
DERING (DEERING) v. EARL OF Winchelsea (1787), 1 Cox, 218, 2 B. & P. 270; 1 Lead. Eq. Cas. 120-188, n.; 21 Rul. Cas. 617-632, n.; 1 R. R. 41, 29 Eng. Reprint, 1184; 11 Mews' E. C. L. 1280-1285; Keener, Quasi Conts. 405-407; 2 Beach, Eq. 823; 2 Rand. Com. Paper, 972; 1 Pars. 34; 1 Chit. Conts. 71; 2 *id.* 801, 802; Danl. Nego. Insts. 1340; 2 Pars. N. & B. 253; 1 Sto. Eq.; Bisph. Eq.; 1 Pom. Eq. 124, 176; 3 *id.* 1212, 1418; Gr. Pub. Pol. 219; 1 Brandt, Sur. 225; Suth. Dam.; Add. 1139; 2 Whart. Conts. 766.
Contribution, doctrines of. Contribution between co-sureties. D. v. W. *See* Hendrick: L.C. 319; *Ubi jus;* Pebbles v. Gay (1894), 115 N. C. 38, 44 Am. St. 429, n.; 2 Beach, Eq. 822-837; 1 Brandt, Surety, 254-297; 1 Pars. Conts. 30-36; Gross v. Davis (1888), 87 Tenn. 226, 10 Am. St. 635-647, ext. n.; Bushnell v. Bushnell (1890), 77 Wis. 435, 9 L. R. A. 411, n.; Wolmerhausen v. Gullick (1893), 62 L. J. Ch. 773, 2 Ch. 514, 68 L. T. 753, 12 Rul. Cas. 823, n.
Right to indemnity by a declaratory judgment. *Quia timet:* Antrobus v. Davidson (1817), 3 Mer. 569, 17 R. R. 130, 12 Rul. Cas. 816, 36 Eng. Reprint, 219, n., 11 Mews. E. C. L. 1296.
No contribution among wrongdoers. Merryweather v. Nixan.
Void judicial sales; purchasers at; right to subrogation. Bright; Bond v. Montgomery (1892), 56 Ark. 563, 35 Am. St. 119, n.; Meher v. Cole (1887), 50 Ark. 361, 7 Am. St. 101; Perry v. Adams (1887), 98 N. C. 167, 2 Am. St. 326, n.; Givens v. Carroll (1894), 40 S. C. 413, 42 Am. St. 889, 21 L. R. A. 48, n.

Dering.—
Rights of purchasers, by reason of void sales, to claim a lien on real estate. Scott v. Dunn (1836), 1 Dev. & Bat. Eq. (N. C.) 525, 30 Am. Dec. 174-182, n., *quoting* Bright; note, 2 Sto. Eq. Pl., § 1257, 2 Warv. Vend. 905, 1 Pom. Eq. 167, 2 *id.* 686, 731, 3 *id.* 1217, 1242. Claimant of land holding under invalid title of his vendors, paying off a mortgage made by his vendors, is subrogated to the rights of the mortgagee. Betts v. Sims (1892), 35 Neb. 840, 37 Am. St. 470, n.
Improvements; right to compensation for. Bright; 2 Warv. Vend. 905; Jewett; 2 Kent, 335.
Junior incumbrancer may compel prior incumbrancer to assign to him. Bank U. S. v. Peters (1839), 13 Pet. 123, 10 L. ed. 69, n.
Underwriter paying loss succeeds to rights of assured against one setting fire and causing loss. Anderson v. Miller (1896), 96 Tenn. 35, 31 L. R. A. 604.
Assured may recover full damages for an injury, and also the insurance, notwithstanding this is a double recovery. Yates v. Whyte (1838), 4 Bing. N. C. 272 (33 E. C. L. R.), 5 Scott, 640 (36 E. C. L. R.), 8 Rul. Cas. 429; Bradburn v. Great Western Ry. (1874), L. R. 10 Exch. 1, 8 Rul. Cas. 430, 3 Mews' E. C. L. 59, 5 *id.* 296, 16 *id.* 112, 118. *See* Dalby.
President of a corporation, paying interest for it on its mortgage, is subrogated to the rights of the creditor. Bush, 60 Mich. 255; Backer, 130 Ind. 288, 30 Am. St. 231, n. *See* 76 Fed. 673, 35 L. R. A. 352: cases.
Volunteer cannot claim. Skinner, 159 Mass. 474, 38 Am. St. 447, n., 21 L. R. A. 673.
One advancing money to pay off mortgage, and to be secured by a new one, is subrogated to the rights under the discharged mortgage. Baker, 2 S. Dak. 261, 39 Am. St. 776, n.; Heisler, 56 Minn. 454, 45 Am. St. 486, n.
It does not depend on assent, express or implied, nor privity. It is independent of *contract* relations. Liles, 113 N. C. 197, 37 Am. St. 627, n.; Spaulding, 129 Ind. 106, 28 Am. St. 176, n.
Volunteers paying cannot be subrogated. Demeter, 115 Mo. 634, 37 Am. St. 422, n. *See* Crumlish, 38 W. Va. 390, 23 L. R. A. 120-134, ext. n.; 1 Beach, Conts. 369; 2 Whart. Conts. 756. Payment by a stranger does not ordinarily inure to the benefit of a debtor. 1 Beach, Conts. 366.
Money paid to another's use. 2 Whart. Conts. 756-771. *See* MONEY HAD AND RECEIVED.
Sureties; right of party who has paid judgment to enforce it for his own benefit. Frank, 130 Ind. 145, 16 L. R. A. 115, n.
A volunteer paying another's debts has no equitable lien. Wood, 124 Ind. 545, 9 L. R. A. 173, n. A county treasurer authorized to receive cash only, and who accepts a check, and for it pays into the county treasury cash, is not subrogated to the rights of the county to enforce its rights for taxes. Mercantile Trust, 76 Fed. 673, 35 L. R. A. 352.
One lending money to pay off a mortgage, with assurances of a mortgage back to secure his, has priority over another who has his mortgage first recorded, with knowledge. Wilton, 75 Wis. 191, 6 L. R. A. 61, n.
Subrogation, generally. Sheldon on Subrogation; Dering. *See* German, 148 U. S. 573, 37 L. ed. 564, n.; 2 Brandt, Sur. 298-329, 4 Am. & Eng. Encyc. Law, 187-

Dering.—
324, 1 Jones, Mort. 874, 875; Mobile Ins., 41 S. C. 408, 44 Am. St. 725-739, ext. n. (insurer's right to subrogation).
Dering case cited in 192 U. S. 311 (motive for exercising a right is no defense). *See* MALICIOUS ACTS.
Stockwell v. Mut. Ins. Co. (1903), 140 Cal. 198, 73 Pac. 833, 98 Am. St. 25-50, ext. n. (subrogation; when implied).

DESCENTS AND DISTRIBUTION: See ADMINISTRATION; 1 Bouv. 550-560; 2 *id.* 259; 14 Cyc. 1-126; 18 Cyc. 594-673.

DESCRIPTION: *Description of a wrong in the mandatory record is essential to confer jurisdiction of subject-matter. See* ALLEGATIONS; CONCLUSIONS OF LAW; *De non apparentibus*, etc.; §§ 152, 182, 219, 237, 240, 313, Gr. & Rud.
Current money cannot be sufficiently described for attachment and replevin purposes, and therefore the rule is that money cannot be attached or replevined. In *habeas corpus* proceedings the person must be described; also in divorce proceedings and those relating to the custody of children. Necessary description is essential for a certain and definite theory of procedure.
Description and statement of a wrong is of vital importance. Cruikshank; Rushton; Wheatley; Windsor. Codes expressly command most clearly and reiterate the command for it. *See* CODES.
There are three departments of state. *See* DIVISION OF STATE POWER. And many courts (Windsor) and many subject-matters and other considerations also. Out of all these arises the demand for certainty of description. *See* CERTAINTY; CONSTITUTIONALISM.
When once made, description is conclusive. 1 Bouv. Dic. 560; Bristow; Sturges; *Expressio unius*, etc.; 1 Chit. Pl. 228, 12th Am. ed. *See* DEPARTURE, *supra;* CONTINUITY.
Dilatory faults must be described. Kraner: 299. *See* ABATEMENT.
Objections and exceptions must be specific. *See* APPELLATE PROCEDURE; Kraner; Miller: 290*b*. § 272, Hughes' Proc.

DESCRIPTIO PERSONAE WORDS: Sturdivant v. Hull: 410. Bouv.; And. Dic. Will not aid, even after judgment. Oystead v. Shed (1815), 12 Mass. 305.
Description of land is essential in probate proceedings. Bloom. Taxation; same rule. Tilton: 133; Lawrence: 132. Codes prescribe that lands must be described by metes and bounds, etc. Description of lands in deeds. 2 Dev. Deeds, 1010-1046. Herm. Ex. 294; Marx; Zigler v. Menges (1889), 121 Ind. 99, 16 Am. St. 357; Tierney v. Brown (1888), 65 Miss. 563, 7 Am. St. 679, n. County and state may be omitted, if section, township and range are given. Rogers, 104 Cal. 288, 43 Am. St. 100, n. Substance, not form, controls documents—pleadings. Misnaming a document is of no consequence. *Falsa demonstratio*, etc.; 5 Cyc. 867-930 (boundaries); 6 Cyc. 1022-1037 (chattel mortgages); Bloom. *See* Bouv.; And. Dic.

DETINUE: 1 Chit. Pl. 136-140, 16th Am. ed.; Ans. Conts. 39; Bouv.; And. Dic.; 5 Mews' E. C. L. 679-689; 14 Cyc. 239-282.

DEVINE v. LOS ANGELES (1906), 202 U. S. 313-339.
Aider by pleading over; limitations. Jurisdiction must appear from the plaintiff's statement of his claim and cannot be aided by allegations as to defenses which

Devine.—
may be interposed. In other words, the essential facts must appear from a sufficient pleading rightly filed; they must appear from the right record in the right place. What is not juridically presented cannot be judicially considered. *De non apparentibus; Quod ab initio;* Montana; Farrar v. Davenport; Fish v. Cleland; Campbell v. Porter.
A reply cannot aid a complaint. Houston R. R. v. Texas (1900), 177 U. S. 78. Nor affect it. Wyatt v. Hundison, 31 Or. 48; 2 Cyc. 691. *See* REPLICATION; AIDER.

DEWEY v. U. S. (1900), 178 U. S. 510, 20 Sup. Ct. 981, 44 L. ed. 1170 (*casus omissus*); *Expressio unius*, etc.; Suth. Stat. 85, 364, 367, 376, 385; § 267, Gr. & Rud.

DICKINSON v. JOHNSON (1901), 110 Ky. 236, 96 Am. St. 434-452, ext. n., 54 L. R. A. 566-576.
Officers' salaries are not subject to process for payment of debt. Assignment by officer of his salary for payment of debts is void. Salus populi. Greenh. Pub. Pol. 351-355; Brice. *Salary invested in land is not exempt.*

DICKSON v. COLE: L.C. 34.

DICTUM (*Factum a judice*, etc.). *Does not bind.* Cohens: 244; Horan: 85; L.C. 268. *See* OPINIONS; §§ 387, 311, Gr. & Rud.; 69 L. R. A. 658; Hume; Clark v. Des Moines. No foundation of essential matters. L.C. 47; Bouv. 567-569; And. Dic.; §§ 34, 122, Hughes' Conts. *See* DECISION; DEPARTURE.

DIDSBURY v. THOMAS: L.C. 213.

DIES DOMINICUS NON EST JURIDICUS: Sunday is not a day in law, or, Sunday is not a day for judicial or legal proceedings. Bro. Max. 21-26; S. v. Conwell: 174; Bouv.; And. Dic.; Bloom v. Richards; Crepps: 113; Scarfe v. Morgan; Van Fleet, Coll. Att., § 33; Ald. Jud. Writs, 12, 29; Styles, 99 Tenn. 128, 63 Am. St. 824, n.; Hauswirth: 55.
Service of process on. Hauswirth; S. v. Conwell. *See* SUNDAY; §§ 28, 167, Hughes' Proc.
Cited, §§ 28, 51, 168, Gr. & Rud.

DIGGLE v. HIGGS: L.C. 371.

DILATORY, ABATEMENT PLEADings are strictly judged. L.C. 149; Kraner: 299. Exact description of errors required. Kraner.

DILL v. S.: Right to defend third persons to preserve the public peace. *See* U. S. v. Holmes.

DIMES v. PROPRIETORS OF GRAND Junction Canal: L.C. 176.

DINEHART v. LAFAYETTE: L.C. 279.

DIRECTING A VERDICT: *Sub* Bonnell: 185: cases; *Ad quæstionem facti*, etc.; Ashby; 6 Encyc. Pl. & Pr. 668-704; *De minimis*, etc.: cases. Duty of court to. Bonnell; Cothran. Cannot in a criminal case. *Ad quæstionem.*

DIRECTORS OF A CORPORATION: Cook Corporations; 1 Bouv. 572-576; And. Dic. Liable for torts. 75 Conn. 555, 96 Am. St. 239-246, n. (are liable for negligence); Kirkwood; Losee.

DIRECTORY STATUTES: *Whatever affects the division of state power, or affects Audi alteram partem, or the due administration of justice is mandatory. See De minimis*, etc.; Suth. Stat. 610-619; Indianapolis, etc. R. R.; Martin v. Hunter's Lessee; Thomas v. Citizens' Bk.; Perez; §§ 109, 199, Hughes' Proc.

DISAFFIRMANCE OF CONTRACTS: By infants. Craig v. Van Bebber; 7 Cyc. 1005-1051; 3 Page, Conts. 1339-1401.

DISCHARGE: Discharge of contract may be shown by oral evidence. 1 Mech. Sales, 474; Browne on Stat. Frauds, 429-436; 1 Gr. Ev. 302. *See* ORAL EVIDENCE.

DISCLAIMER: Bouv.; And. Dic.

DISCONTINUANCE: L.C. 170; 11 Mews' E. C. L. 218-226; Bouv.; And. Dic. *See* DISMISSAL.

DISCOVERY: When allowed to aid preparation for trial. Reynolds, 71 N. H. 322, 93 Am. St. 535. *See* C. v. Kane: 183: cases. But a court will not order a physical examination. *Res ipsa loquitur. See* BILLS OF DISCOVERY. Bouv.; And. Dic.; 5 Mews' E. C. L. 690-969; 14 Cyc. 301-382; 3 Wigm. 1845-1862.

A respondent owes as a duty—right. Graver: 103. And to save expense. Sto. Eq. Pl. 849. Courts will direct that new matter be denied. Kollock. Courts will order, when, to enable one to prepare for trial. *Sub* C. v. Kane: 183.

DISCRETION: Matters of, not reviewable. L.C. 298; § 256, Gr. & Rud. See *De minimis*, etc.; 14 Cyc. 392; Wheeler, 121 Cal. 287, 66 Am. St. 20, n.; Bouv., And. Dic.

But abuse of, is. Lybecker v. Murray (1881), 58 Cal. 186, n.; 50 Am. Dec. 804; 93 *id.* 150; Ell. App. Proc. 603-606; 1 Bish. Cr. Proc. 6, 10, 12; 2 Encyc. Pl. & Pr. 409-420: cases; 6 *id.* 819-822. Refusal to quash an indictment is discretionary. Additional evidence may be received before case is submitted. See *De minimis*, etc.; Hughes' Proc.; Bridger, 126 Ga. 821, 115 Am. St. 118. Joint and several trials; allowance of, is discretionary.

Optima est lex quæ minimum relinquit arbitrio judicis; optimus judex qui minimum sibi: That system of law is best which confides as little as possible to the discretion of the judge; that judge is best who relies as little as possible on his own opinion. Bro. Max. 84; Cool. Torts, 10. But a court must exercise its discretion; it cannot refuse to open the record, to look, be informed. L.C. 153. *De minimis*, etc.

DISJUNCTIVE ALLEGATIONS: *See* ALTERNATIVE PLEADINGS; CERTAINTY; Pain; 1 Bouv. Dic.

DISMISSAL, of a cause; right to. Blair: 170; McLeod v. Bertschy; 6 Encyc. Pl. & Pr. 824-1004; 14 Cyc. 387-465; 16 *id.* 460-469. *Nolle prosequi:* cases.

DISORDERLY CONDUCT: 14 Cyc. 466-478.

DISORDERLY HOUSE: 9 Am. Crim. Rep. 238, 239 (what constitutes); 2 Bish. Crim. Proc. 277-283; Bouv., And. Dic.; 5 Mews' E. C. L. 969-975; 14 Cyc. 479. Conclusions of law in indictment for. J'Anson: 91. General reputation to prove. 10 Am. Crim. Rep. 272; C. v. Gannett; *Res inter alios*, etc.

DISTRESS: Bouv.; And. Dic.; 5 Mews' E. C. L. 975-1048; 14 Cyc. 539-541.

DISTRICT OF COLUMBIA: 14 Cyc. 526-538.

DISTURBING MEETING: 2 Am. Crim. Rep. 133; 2 Bish. Cr. Proc. 284-301.

DITCHBURN v. GOLDSMITH: L.C. 359.

DIVINE v. HARVIE (1828), 7 T. B. Mon. 439, 18 Am. Dec. 194-207, n.; Brown, Jurisdic.

Municipal corporations not subject to garnishment. S. v. Tyler (1896), 14 Wash. 495, 53 Am. St. 878; Addyston, 170 Ill. 580, 44 L. R. A. 405; Geist, 156 Mo. 643, 79 Am. St. 545.

May waive their rights. Portsmouth, 97 Va. 124, 45 L. R. A. 246: cases.

DIVINE LAW: *See* CHRISTIANITY. "There is a divinity that shapes our ends, rough hew them as we will."

Is not a part of the common law in America. Crepps. See *Summa ratio*, etc.; *Jurisprudentia est divinarum*, etc. §§ 5-5*b*, Hughes' Proc.; Church.

DIVISION OF STATE POWER: This phrase means the vesting of state power in the various departments and functionaries of government, to wit, the executive, judicial and legislative departments. It is for the public welfare, and generally involves matters that cannot be waived or contracted away, *e. g.*, one accused of crime cannot waive a jury of twelve; nor that the proper judicial officer shall not sit and try a cause. §§ 28, 70, 102, 103, Hughes' Proc. *Cited:* §§ 12, 60, 63, 134, 137, 237-258, Gr. & Rud.; Burton v. U. S.

Divide et impera cum radix et vertex imperie in obedientem consensus rata sunt: Divide and govern since the foundation and crown of empire are established in the consent of the obedient.

It involves what are subjects of great discussion in constitutional law. Marbury: 142. It profoundly involves procedure. *See* APPELLATE PROCEDURE; CERTAINTY; PROCEDURE.

Doctrines of, generally: S. v. Baughman: 268; Dennett: 145; De Chastellux. *See* EXECUTIVE, JUDICIAL AND LEGISLATIVE POWER; Judicial Legislation, Bouv., And. Dic., Department; *Jurisdictio est potestas*, etc.; No. 47, The Federalist; Suth. Stat. 2, 6, 11; Preface, Cool. Blackstone; COURTS. Judiciary is supreme. Marbury: 142; Sherrill, 188 N. Y. 185, 117 Am. St. 841. *Cujus est instituere.*

The parties and the clerk establish the mandatory record. *See* JURISDICTION; COURTS.

Notice to be given by the ministerial department cannot be given by the judicial. See Cooper v. Reynolds. Essential record matter to prove notice to be made of record by the ministerial hand cannot be dispensed with by a superfluous judicial recital.

Division of state power is involved, and is of leading importance. L.C. 268, 145. *See* CONSTITUTIONAL LIMITATIONS.

Procedure and taxation respect division of state power. Van Slyke: 177; P. v. Hastings: 144.

Judges cannot delegate their functions. L.C. 177. *See* DEPUTY. Clerks cannot delegate their powers to judges. L.C. 145, 146.

Division of state power is a dominating principle, or dominant initial. *Leading rules of procedure depend on respect for.* The forms of the law are a part of the law. L.C. 145, 268.

A justice cannot serve his own summons. McDugle, 79 Miss. 53, 89 Am. St. 582. *See* Keech.

Inferior tribunals may make their records. Crepps. Superior judges can not, for the reason that the clerk can not be construed out of the scheme of government.

Division.—

A solicitor of the treasury may issue an execution. Murray: 219.

Grant of non-judicial powers to courts. Zanesville, 64 Ohio, 67, 52 L. R. A. 150, n.

Courts are bound by constitutions, statutes, common-law rules of court and their records—the pleadings. Out of these they can not move, in a constitutionalism. When they do, their performances partake of arbitrary edicts, and are void. They are not bound to do exact justice, except consistently with rules of procedure. *See* DEPARTURE; Austin R. R.; Windsor; Cothran; S. v. Sheppard, *Lex non exacte.*

DIVORCE: Fraud will vitiate. Borden: 267; Andrews. *False and sham allegations for, will vitiate.* Graver: 103.

Recrimination as defense in divorce proceedings. Decker, 193 Ill. 285, 86 Am. St. 325-342, ext. n.

Party also at fault cannot procure, as where plaintiff is guilty of adultery. Fisher, 95 Md. 315, 93 Am. St. 334; Collins.

Defenses not pleaded but still known to the court may be acted on. Fisher, *supra.*

Conflict of laws on subject of divorce. Succession of Benton (1901), 106 La. 494, 59 L. R. A. 135-187, ext. n.; Van Voorhis.

Right to contest the validity of a divorce decree after the death of one or both of the parties. Lawrence, 113 Ia. 277, 57 L. R. A. 583-603, ext. n.

Loss of right to after it has once vested, as where an intemperate husband reforms. Allen, 73 Conn. 54, 84 Am. St. 135. *See* CAUSE OF ACTION.

Fresh acts of adultery can not be brought forward by supplemental bill. Schwab, 96 Me. 592, 94 Am. St. 598, n., *contra:* cases.

Alimony; practice relating to. Methvin, 15 Ga. 97, 60 Am. Dec. 664-682, ext. n.; Lea, 104 N. C. 603, 17 Am. St. 692, n.; 1 Encyc. Pl. & Pr. 407-457; Milliron, 9 S. Dak. 181, 62 Am. St. 863; Anderson, 124 Cal. 48, 71 Am. St. 17-25, n. Decrees of divorce; effects of; impeachment of. 1 Bailey, Jurisdic. 260-286; Haddock.

Non-residents; effect of against. Felt, 59 N. J. Eq. 606, 83 Am. St. 612-628, n.; Atherton (1901), 181 U. S. 155. Haddock.

Domicile of parties essential. Bell, 181 U. S. 175; Streitwolf, 181 U. S. 179; 2 Am. Crim. Rep. 159.

Generally: 1 Bouv. Dic. 593-597; 14 Cyc. 556-822; 7 Encyc. Pl. & Prac. 49-147; 5 Mews' E. C. L. 1048. See cases in Am. St. and L. R. A. Reports; also Bishop and Nelson on Marriage and Divorce.

DIXON v. BELL (1816), 5 Maule & S. 198, 17 R. R. 308, 1 Stark. 287, Bigl. Lead. Cas. Torts, 568, 17 L. R. A. 34, 1 Add. Torts, 544, 584, 1288; Moak, Underh., Torts; Cooley, Bishop; Bro. Max. 391; Shear. & Redf. Neg.; Whart. Neg.; 36 Am. St. 814; Busw. Pers. Inj. 129; 46 L. R. A. 38; Suth. Dam., Thomp. Neg., *q. v.*; 9 Mews' E. C. L. 916-924; 10 *id.* (nuisance); Huffc. Ag. *Cited,* §§ 347, 348, Hughes' Proc. §§ 296, 303, Gr. & Rud.

Dixon v. Bell stated: B. sent a child to bring him a gun; the child wounded D., who sued B., and recovered. Negligence of a third person, no defense.

McManus (liability of the principal for acts of the agent).

DOBSON v. CAMPBELL: L.C. 232a.

DOCUMENTS: How pleaded. *See* COPIES; EXHIBITS. Bouv. Dic.

DOE D. DIDSBURY v. THOMAS: *See* DIDSBURY V. THOMAS, Smith, Lead. Cas.: 213.

DOE v. OLIVER: *See* CHRISTMAS.

DOE D. RIGGE v. BELL: *See* CLAYTON.

DOGS: Property in; remedies for enforcement of. Hamby, 105 Iowa, 112, 67 Am. St. 285-299, ext. n., 40 L. R. A. 508-525, ext. n.; Graham, 106 Ga. 434, 40 L. R. A. 509-525, ext. n.; 2 Am. Crim. Rep. 338; Bouv. Dic.

Ferocious; liability for keeping. Loomis v. Terry (1837), 7 Wend. 496, 1 Thomp. Neg. 192-223, n., 31 Am. Dec. 306-310; Bish. Torts; Wat. Tres.; Shear. Neg.; Whart.; Wood, Nuis.; Conway, 88 Ga. 40, 30 Am. St. 195, n., 14 L. R. A. 196, n.; Shultz, 103 Ga. 150, 40 L. R. A. 150, Tiede. Pol. Power; Cool. Torts; May v. Burdett.

Trespassing dogs; no right to kill. Hodges, 77 Miss. 353, 78 Am. St. 525, n., 48 L. R. A. 95, n. *See* Aldrich; Chapman, 93 Me. 378, 74 Am. St. 357, n. Damages for killing. 2 Suth. Dam. 449, 450.

Barking a nuisance. Herring, 106 Va. 171, 7 L. R. A. (N. S.) 348, n.

DOLL v. GOOD (1868), 38 Cal. 287. *Denials must be certain and must answer with certainty all they profess to answer, free of argument, evasion or ambiguity. Dolosus,* etc.; Gay; Preston v. Roberts (1877), 12 Bush (Ky.), 570, 582; Dickson: 34-44. S. P. Higgins; Pueblo County; Richardson; San Francisco; Kewaunee County: 29; Green: 90. Qualified denials bad. L.C. 34; Crater; Hannen. *Verba generalia,* etc. Conclusions of law need not be denied. *See* CONCLUSIONS; Curnow (1885), 68 Cal. 262. Surplusage need not be denied. *See* CONCLUSIONS. *Cited,* § 93, Hughes' Proc.

DOLLAR: Bouv., And. Dic.

DOLOSUS VERSATUR IN GENERALIbus: A deceiver deals in generals. See *Dolus versatur,* etc.; Robinson: 45; Bro. Max.; Twyne's Case; Doll. *Fraud lurks in glittering generalities. See* Twyne's Case; CONCLUSIONS OF LAW. General denial; general issue; sham pleadings. *See* AMBIGUITY; DUPLICITY; *Verba fortius;* Pain: 107. *See* CERTAINTY; ALLEGATIONS; *Allegans,* etc.; objections and exceptions must be specific. *See* ASSIGNMENT OF ERROR; Kraner: 299: cases. *Dolus latet in generalibus:* Fraud lurks in generalities. Twyne's Case. *See* CONCLUSIONS OF LAW; *Dolosus,* etc. Doll. *Dolus versatur in generalibus:* Fraud deals or converses in generalities. *See Fraus latet,* etc.: Trayner, Max. 162. Facts must be pleaded. Cruikshank: 232. Titles to statutes must be certain. Suth. Stat. 90; Bobel: 250.

DOMICILE: *See* CITIZENSHIP; RESIDENCE; 1 Bouv. 600-605; 2 *id.* 904; And. Dic.; S. v. Allen (1900), 48 W. Va. 154, 86 Am. St. 29; Haddock; 14 Cyc. 831-866.

DOMINANT INITIALS: *Are few and brief. See* CONSERVING PRINCIPLES; Austin R. R.; SUPREME LAW; CONSTITUTIONAL LAW; FUNDAMENTAL PRINCIPLES; MANDATORY RECORD. §§ 145, 146, Gr. & Rud.; MAXIMS.

Genius of procedure is protection, morality and intelligence. See CONSTITUTIONALISM; Trist: 214. *Courts advance these. See* CONSTITUTIONALISM.

Sovereignty; its position; the creator and ordainer of courts. See COURTS; CONSTITUTIONAL LAW; PARTIES; DEFINITIONS; GOVERNMENT.

Description of a wrong essential. See DE-

Dominant.—
SCRIPTION; EVIDENCE; *De non apparentibus*, etc.; JUDICIAL NOTICE.
Pleadings confer jurisdiction. § 1, Hughes' Proc. *See* CERTAINTY; MANDATORY RECORD.
The conserving principles of procedure control in construction. *See* CONSTRUCTION; DEFINITIONS; PROCEDURE.
DOMINIUM NON POTEST ESSE IN pendenti: The right of property cannot be in abeyance. Halker's Max. 39. *See* DEEDS.
DOMUS SUA CUIQUE EST TUTISSImum refugium: Every man's house is his castle, or, as stated elsewhere, every Englishman's house is not his castle. Bro. Max. 438-442; Semayne; Williams v. Essling; Anthony; Aldrich; Ilsley; Hawkins v. C.; J'Anson; Taylor v. Cole; Fisher v. McGirr.
Breaking and entering doors to serve process; sheriff's powers, rights and duties. Semayne's Case. *See* ARREST; SELF DEFENSE.
DORITY v. DORITY (1903), 96 Tex. 211, 30 Tex. Civ. Ap. 216, 70 S. W. 338, 60 L. R. A. 941. § 62, Gr. & Rud.
Husband and wife: construction of statute. Giving husband control of wife's separate estate during marriage. Equity will protect her estate from a defaulting spendthrift husband and enjoin him from interfering with or using it, without her applying for a divorce. *Ubi jus ibi remedium; Concordare legis*, etc. *See* EQUITY.
Statutes are construed to exclude fraud, usurpation and abuse of power. See L.C. 341; *Lex non exacte;* S. v. Sheppard.
The above is a case of first impression. It advances the remedy and represses the mischief. *See* PRIVACY; INJUNCTION.
DORN v. FARR (1899), 179 Ill. 110, 55 N. E. 566 (to be well considered). *Cited,* § 56, Gr. & Rud.
Variance is waived if not objected to. General objections are not available. *See* Shutte: 291.
Party cannot conceal objections to use on appeal in case of defeat. Dorn. *See* Windsor: 1; Guedel: 74a. § 56, Gr. & Rud. Campbell v. Porter; *Dolus.*
Allegata et probata must correspond. Bristow: 135: cases; Guedel; Fish v. Cleland.
Variance cannot be waived in equity cases. Lang v. Metzger (1904), 206 Ill. 475, 488; Fish v. Cleland; 1 Sto. Eq. Pl. 10; *Frustra probatur quod probatum non relevat;* Guedel.
The *Lang Case* emphasizes the strict rule for equity. Guedel. For crime. Davenport v. Farrar (law). *See* VARIANCE; ILLINOIS; 16 Cyc. 403-406, *contra* cases. Pleadings often waived. 2 Cyc. 691-693: cases.
Same strictness in all cases. 1 Gr. Ev. 65; Dovaston. *Contra,* 12 Cyc. 390. *See* CONSERVING PRINCIPLES OF PROCEDURE. §§ 83-123 Gr. & Rud.
DOUGLAS v. WHITING (1862), 28 Ill. 362 (omission of defendant's name in an execution vitiates an execution sale). The mandatory record must be perfect. Tarble: 247; Six Carpenters: 165. *See* COLLATERAL ATTACK.
DOVASTON v. PAYNE: L.C. 217.
DOWER: Bouv. Dic., 14 Cyc. 871-1016.
DRAINS: 14 Cyc. 1018-1072.
DRAPER v. MEDLOCK (1905), 122 Ga. 234, 69 L. R. A. 483-488 (*res adjudicata* under code depends on the pleadings).
Res adjudicata. Estoppels are odious. Every presumption is against a pleader. The burden is on him to show upon what issues a judgment pleaded as an estoppel

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rests. Russell v. Place; De Sollar v. Hanscombe (U. S.), *stated and approved,* also Greene v. Bk. (73 Miss. 542), Augir v. Ryan (63 Minn. 373), Hearn v. Boston Co. (67 N. H. 970. Instructive case), Thompson v. N. T. Co. (80 Fed. 332): "Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried and determined, so that the judgment could not have been rendered without deciding it, there is no estoppel." (Connecticut, also Eng. Jud. Act).
Evidence *aliunde* is admissible to identify issues if consistent with the record. Mondel: 77.
Ambiguous pleadings faulty. Lea: 30; Dovaston: 217; Pain: 107.
Codes respect the record rule as a conserving policy. *See* CODES. Rules of pleading are interactions from those policies. Hoover v. King (Or.); Ruckman v. R. R. In the light of this proposition collateral attack and *Res adjudicata* should be considered.
The due process of law record is that record which must evince the mandatory requirements of a constitutionalism in judicial proceedings. What those requirements are must be gathered and comprehended from the conserving principles of procedure. Those matters are of public concern and cannot be waived for the reason that not only the parties on the record are interested but the whole public as well. *Res inter alios acta,* etc. It is that record which makes the rule, "the general demurrer searches the whole record and attaches to the first fault" available. That rule involves and depends upon that record.
The statutory record may be viewed as the correlative of the due process of law record. It is often a complement of that record. It is an incidental, auxiliary or conditional record. It is to present matter that can be waived or contracted away by the parties named upon the record, or waivable, or dilatory, or abatement matter. It involves matter and proceedings that must be objected or excepted to and this renewed by a motion for a new trial and finally assigned for error. It may be waived and waiver of it and its matter is favored.
Very unlike theories govern the matter and proceedings of the due process of law record from the statutory record. Courts will *sua sponte* open the former record and look for error therein and act upon it (*Campbell v. Porter; Garland v. Davis*)

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but otherwise as to the matter and proceedings of the statutory record. To it applies with all its strictness *Consensus tollit errorem.*
DRAYTON v. WELLS (testimony of witnesses dead, absent or subsequently disqualified. *Res inter alios acta,* etc.), L.C. 213*e.*
DRED SCOTT: Scott v. Sandford (1858).
DREW v. DAVIS (1838), 10 Vt. 506, 33 Am. Dec. 213; 1 Cool. Tax. 590; 2 *id.* 1469. *Cited,* § 190, Hughes' Proc.
Assessments must be in apt time. Tribunals must act as provided for. L.C. 170, 18, 133; McLean v. Jephson; 1 Freem. Judg. 121. *See* CERTAINTY. Suth. Stat. 535-541.
A valid assessment depends on regularity and continuity. Welty, Assess. 224 (important rationale in procedure. Ricketson).
Assessments must be made within the time specified. Welty, Assess. 224; Thames Mfg. Co., v. Lathrop (1829), 7 Conn. 550; Fletcher; Cool. Tax. 415; Westfall v. Preston (1872), 49 N. Y. 349; 1 Desty, Tax. 607 (must be within the time fixed for assessing); Freeman v. Kenny (1833), 15 Pick. 44; P. v. Moore, 1 Idaho, 666-670; Drew, *supra;* Wall v. Trumbull (1867), 16 Mich. 245; Magna Charta (a court or tribunal must act at terms specified); Wirthington v. Evelyeth (1828), 7 Pick. 106; Little v. Merrill (1830), 10 Pick. 543; McLean v. Jephson (1890), 123 N. Y. 142; 9 L. R. A. 493, n.; Gage v. Currier. *See* Hunter Co. v. Woodard (1898), 152 Ind. 474; *De minimis,* etc.
A tax, like a judgment, is an entirety, and if in part void, is void in toto. Drew; 2 Desty, Tax. 118: cases; 1 Cool. Tax. 590.
Taxing officials, liable for proceeding illegally. Stetson; 1 Wat. Tres. 504; 6 Robt. Prac. 727; 2 Desty, Tax. 1105; 2 Cool. Tax. 1467-1470: cases.
Continuity an important rule of procedure. *See* CONTINUITY.
DRUGGIST: Liability of. Thomas v. Winchester. *See* Bouv. Dic.; 14 Cyc. 1078-1088; § 294, Gr. & Rud.
DRUNKARDS; DRUNKENNESS: Competency to contract. Gore, stated, *sub* U. S. v. Drew. 2 Page, Conts. 903-910.
Contracts with, voidable. Ans. Conts. 115, *sub* U. S. v. Drew.
How drunkenness affects criminal intent. U. S. v. Drew; C. v. Rogers; R. v. Cruse.
Intoxication as a defense. McClain, C. L. 159-163; 3 Am. Crim. Rep. 162-165; 9 *id.* 534-536; French v. S. (1896), 93 Wis. 325, 10 Am. Crim. Rep. 606-625, n.
Intoxication as affecting negligence. Kingston, 112 Mich. 40, 40 L. R. A. 131-150, ext. n.
Generally. Bouv. Dic. 619-621; And. Dic.; 14 Cyc. 1089-1106.
DUCHESS OF KINGSTON'S CASE: L.C. 76.
DUE ADMINISTRATION OF JUSTICE: *Defined and discussed in Windsor:* 1; *Murray's:* 219; *Galpin v. Page. See* DUE PROCESS OF LAW; Hughes' Proc.; *Audi alteram partem; Coram judice;* Bailey, 190 Ill. 28, 83 Am. St. 116. §§ 1-12, 51-103, Hughes' Proc.
Cited, §§ 83-123, 134, 139, 138-140, 147, Gr. & Rud.
Requires due process of law. §§ 62, 166, 145, 253, Hughes' Proc.
Requires pleadings. De non apparentibus, etc.; Windsor; Rushton; Outram; Cromwell; Starbuck; Bloom; Sto. Eq. Pl., § 10; 1 Gr. Ev. 63, 528; 2 *id.* 7; 3 *id.* 10. Proofs also. *Actore,* etc. *Ei incumbit.* Burden of proof. L.C. 185; Cothran.
Allegata et probata must correspond. Bristow: 135. See *Res adjudicata;* VARIANCE.
Limitations of legislative power. Indianapolis: 223; Dimes: 176; Dash: 237*a. See* CONSTITUTIONS; DIVISION OF STATE POWER; Windsor; Cohens; *Dictum.*
Statutes that unwisely incumber and which tend to defeat are disregarded. L.C. 223; O'Connell v. Reed: 224.
Courts are created and obligated to advance and afford remedies to wronged persons, who complain. S. v. Baughman: 268; Dority; Windsor. *See* COURTS; Bro. Max. 262, 329, n., 342. *May remove impediments. See* CONTEMPTS; COURTS; L.C. 225*a.*
Essential steps of, must be evinced by the mandatory record. See *id.;* Windsor; DUE PROCESS OF LAW; Crain (instructive case); *Quod ab initio,* etc.
Stability of law essential. Windsor; Dash; Kewaunee County. *See* CERTAINTY.
Continuity of jurisdiction of a certain subject-matter essential for. See CONTINUITY; Drew; DESCRIPTION; SUBJECT-MATTER; DEPARTURE; THEORY OF THE CASE; Garland v. Wholebau; REMOVAL OF CAUSES.
Fraud repressed in due administration of justice. Dunlap: 168; *Ex dolo malo,* etc. *Demands true pleadings.* Graver: 103. See PERJURY. §§ 5-5*b,* Hughes' Proc.
Repression of sham, false and fictitious pleadings. See CONTEMPTS; SHAM PLEADINGS; *Ex dolo malo,* etc. *Reality of controversy.* S. v. Baughman; *Fabula non judicium; Leges non verbis,* etc.
Removal of causes to federal courts to secure due administration of justice. See REMOVAL OF CAUSES.
Abuse of rights given under, is actionable. McCardle v. McGinley; Grainger v. Hill; Graver: 103.
The means of are an unwritten constitution. S. v. Sheppard.
Conspiracy to impede, hinder, obstruct and defeat, is actionable. Ferguson; 3 Gr. Ev. 90. *See* CONSPIRACY: cases; CIVIL RIGHTS.
DUELLING: 14 Cyc. 1110-1118.
DUE PROCESS OF LAW: The supreme court of the United States is unable to find an acceptable definition of procedure, of which due process of law is a large and important part, which, under the 14th Amendment of the Federal Constitution, must be defined by that high court. When it defines so important and vital a part of the leading subject, then its correct definition will be less difficult. § 19, Hughes' Proc. See *id.,* pp. 575-579; McGehee on.
Cited, §§ 18, 79, 115, 118, 119, 214-225, 241, 268, 269, Gr. & Rud.
A conserving principle. §§ 92-93, 137-140, 241, 267-269, *id.*
Defined. §§ 92, 93, 214, 241, *id.*
The language of the 14th Amendment. § 159, *id.*
The following cases may be consulted: Davidson v. New Orleans (equivocal definition); L.C. 219: cases; Westervelt v. Gregg (1854), 12 N. Y. 202-213: *cited,* Cool. Const. Lim., 219*a*: cases; Dash; Roller v. Holly (1900), 176 U. S. 398; Boardell v. Collins (1890), 44 Minn. 97, 20 Am. St. 547-549, ext. n. (defining it as a varying subject; taxation is within

Due Administration.—

Due Process.—
meaning of); 199 U. S. 21; Welty, Assess. 154-156, 250-274; 1 Black, Tax. Tit. 75-102; 39 Neb. 463, 42 Am. St. 595, n. (legislative power to change rules of evidence—to declare evidence); L.C. 257; S. v. Billings (1894), 55 Minn. 467, 43 Am. St. 525-541, ext. n. (lunatics within protection of); Evans v. Johnson (1894), 39 W. Va. 299, 45 Am. St. 912, n. (notice to lunatic is implied); S. v. Hewitt (1892), 3 S. Dak. 187, 44 Am. St. 788, n., 16 L. R. A. 413 (public officer cannot be removed without a hearing); Wadsworth v. U. P. R. R., 18 Colo. 600-614, *sub Verba generalia*, etc.; Trainor v. Board of Auditors (1891), 89 Mich. 162, 15 L. R. A. 95, n.; S. *ex rel.* Hastings v. Smith (1891), 35 Neb. 13; School District v. McComb (1893), 18 Colo. 240 (a school teacher entitled to notice before removal); 1 Dill. Munic. Corp. 253-256, n. (a motion of officer must be upon notice); Schlitz v. Roenitz (1893), 86 Wis. 31, 21 L. R. A. 483 [to parent to adopt his child; Furgeson v. Jones (1888), 17 Or. 204, 3 L. R. A. 620, n.]; Chauvin v. Valiton (1889), 8 Mont. 451, 3 L. R. A. 194; Burdick v. P. (1894), 149 Ill. 600, 41 Am. St. 329, n., stating Davidson v. New Orleans; Atty. Gen. v. Jochim (1894), 99 Mich. 358, 41 Am. St. 606, n.; Pearson v. Yewdall (1877), 95 U. S. 294 (24 L. ed. 436, n.); Cool. Const. Lim. 16, 433; Van Fleet, Coll. Att. 386; Fisher v. McGirr; Carleton v. Rugg (1889), 149 Mass. 550, 5 L. R. A. 193, n.: cases (whiskey); Miller v. Horton (health board killing horse); Donovan v. Vicksburg (1855), 29 Miss. 247, 64 Am. Dec. 143 (sale of animals running at large); 1 Dill. Munic. Corp. 346-348; Fort Smith v. Dodson (1889), 51 Ark. 447, 4 L. R. A. 252 (sale of impounded animal by marshal).

See CONSERVING PRINCIPLES OF PROCEDURE; §§ 83-123, Gr. & Rud.; *Audi alteram partem; Coram judice*; CONSTRUCTION. L.C. 213-233.

Coram judice proceedings essential for due process of law. Windsor; Trough, 59 W. Va. 464, 115 Am. St. 940 (*cites* Windsor, Hovey, Rouse and other cases); Cruikshank: 232; Huntsman: 231; Murray: 219; Ransom: 122.

Regular allegations required. Murray; Windsor; Rushton: 5; Cruikshank.

Conclusions of law insufficient. Cruikshank; James v. Bowman: 233; Wheatley: 219; Moore: 21; Rushton: 5; Hanford: 86; Howard v. S. (will not support a warrant).

An issue, shown from the right record, essential for a trial. Crain; Munday: 79; Borkenhagen: 81 (code). *See* ISSUE.

Defenses not pleaded are waived. Kollock; Munday: cases; Cromwell: 26.

Construction conserves all that relates to due process of law as a part of the supreme law of the land, agreeably to the maxim *In præsentia majoris*, etc. (In the presence of the major the power of the minor ceases). For that law, state constitutions, statutes, rules of court, traditions and conventionalities yield.

A state constitution yields to the requirements that no man shall be judge of his own cause. Nemo debet esse judex, etc. Oakley: 222; Dimes: 176; S. v. Sheppard (setting aside written laws for the prescriptive constitution). *Likewise statutes.* Indianapolis, etc.: 223; O'Connell: 224; Bates: 225. *Lex non exacte*, etc.; *Expressio eorum*, etc.

Limitations of waiver, liberal construction and presumptions of regularity essential for the integrity of due process of law. Pennoyer: 58; Cruikshank; Galpin: 64; *De non apparentibus*, etc.; *Omnia præsumuntur rite*, etc. *See* Hahn; 2 Thomp. Tri. 2310, 2311; Ell. App. Proc. 717, 811.

DUE PROCESS OF LAW RECORD: See MANDATORY RECORD. The office and the functions of this record should be comprehended from *Windsor:* 1; Perez v. Fernandez: 2*e;* Munday: 79; Cruikshank: 232; Crain; Planing Mill Co.; Roden v. Helm and Campbell v. Greer (Mo.). *See* § 48, Gr. & Rud.

Operations of government depend on. §§ 90, 108, 115, 118, 119, 136, 140, 147, 152, 164, 237, 239-256, Gr. & Rud.

Estoppel of record depends on. § 177, Gr. & Rud.

Meaning of. § 118, Gr. & Rud. *See* MANDATORY RECORD; Hughes' Proc. 575-584; ALLEGATIONS; *De non apparentibus;* L.C. 213-233; Trough, 59 W. Va. 464, 115 Am. St. 941 (*cites* Windsor, Hovey, Rouse and other cases).

DUMPOR'S CASE (DUMPOR v. SYMMS) (1603), 2 Coke, 119; Cro. Eliz. 815; 1 Sm. L. C. 95-114; 11 ed. 32-54 (reviews recent English cases); 5 Gray's Cas. Prop. 23; 1 Wash. R. P. 471-472, n. (this case is a stumbling block); Bro. Max. 296; 2 Chit. Conts. 1389; Bisph. Eq.; 4 Kent, 124; Tiede, R. P.

Cited, §§ 144, 148, Hughes' Conts.

Conditions; leases. A condition in a lease not to assign if waived on one occasion is waived forever. Such conditions are entire, and if waived in part are waived in toto. Dumpor's Case; 2 Add. Conts. 720.

Conditions subsequent; what are. Post v. Weil (1899), 115 N. Y. 361, 12 Am. St. 809, n., 5 L. R. A. 422; Farnham v. Thompson (1885), 34 Minn. 331, 57 Am. Rep. 59-68; Ecroyd, 21 R. I. 1, 41 Atl. 260, 79 Am. St. 741-769.

Strict construction governs. Parmelee v. O. & S. R. R. (1851), 6 N. Y. 74; Morton v. Weir (1877), 70 N. Y. 247; Sedgk. & Wait, Tri. Tit. 367.

Assignments by operation of law are a sufficient breach. Medinah Temple Co. v. Currey (1896), 162 Ill. 441, 53 Am. St. 320.

And landlord may re-enter, for then it is at his election. Stuyvesant v. Davis (1842), 9 Paige, Ch. 427; Collins, 56 N. Y. 157.

Estoppel to enforce; waiver of forfeiture by act and conduct. Moses v. Loomis (1895), 156 Ill. 392, 47 Am. St. 194.

Mining oil and gas, *sub, Expressio eorum*, etc.; 31 L. R. A. 673, n. *Forfeitures are odious.* Kemble: 391. *Of leases.* Willison, 4 Kent, 104.

Conditions generally. 2 Dev. Deeds, 958-991; 4 Kent, 95, 122; 3 Mews' E. C. L. 2050-3132. *See* CONDITIONS.

DUNLAP v. CODY: L.C. 168.

DUPLICITY: *Duplicity is a fault and must be avoided.* Pain: 107; Lea: 30; Waverton: 70; Kawaunee County v. Decker (a pleading cannot be "fish, flesh or fowl"—code case); Bliss, Code Pl. 288-295; Robinson: 45; Bowlus: 100. *See* CONSTRUCTIVE NOTICE; CERTAINTY; Bouv. Dic. 386; Huntsman; Cruikshank: 231, 232; McClain, C. L.; 1 Am. Crim. Rep. 345.

Duplicity vitiates abatement or dilatory pleadings, which must be single, precise and certain. Kraner: 299. This rule should be considered in reference to one of the conserving principles of procedure.

Duplicity.—
See ABATEMENT. *Double plea.* 1 Bouv. Dic. 609.
Cannot both plead and demur to the same statement at the same time. Auburn: 9; *Allegans contraria*, etc. *See* DEMURRER.
Alternative pleadings not permissible, and are fatal after verdict. *See* ALTERNATIVE; Cruikshank; Pain.
A pleading cannot perform the office of both answer and counter-claim. 151 Ind. 418.
Duplicate statements not permissible under codes. Sturges: 111. Nor in equity. R. I. v. Mass. (1840), 14 Pet. 250 (pleas must be single).
DURESS: *See* Sasportas; Watkins; VOLUNTARY PAYMENTS; 2 Gr. Ev. 301, 302; And. 387; Bouv. Dic.; 5 Mews' E. C. L. 1050-1053.
Note given to prevent prosecution. Beath, 115 Mich. 506, 69 Am. St. 589; Kusworm.
Duress avaids contracts. §§ 13, 64, 65, Hughes' Conts. Duress to person. Ans. Conts. 164; Whart. 144-154. To goods. Ans. Conts. 164; Whart. 144-154; Sasportas.
Minds of the parties must meet freely and voluntarily. Gorringe v. Reed (1901), 23 Utah, 120, 90 Am. St. 692, n. (assent essential for a contract).
DUSENBURY v. ELLIS: L.C. 412.
DUTTON v. GERRISH: L.C. 381.
DUTTON v. POOLE (1676), 1 Ventris, 318, 332; 2 Lev. 210; 4 Mews' E. C. L. 96; 15 *id.* 1466; Whart. Conts. 784. *See* Hendrick: 319. *Cited*, § 129, Hughes' Conts.
DUTY: Omission of, when criminal. McClain, C. L. 129. *See* TORT; CRIME.
DUVALL v. ELLIS (1850), 13 Mo. 203.
Objections and exceptions must be specific to depositions as elsewhere. The grounds of objection must be specially pointed out. L.C. 296, 299; Honeycutt v. R. R., 40 Mo. App. 667.
Copies of sister state judgments must be in due form under the act of May 26th, 1790. It must state that "the attestation of the clerk is in due form." What one does not state he cannot claim. *Verba fortius.*
The provisions of the act of congress are not exclusive. The record may be authenticated as at common law.
Forms of certificate. 13 Mo. 204.
DWELLING-HOUSE: Bouv. Dic.; McClain, C. L.
DYER v. DYER (1788) 2 Cox, 92; 1 Wat. Cop. 216, 1 Lead. Eq. Cas. (W. & T.) 314-364, ext. n.; 30 Eng. Reprint, 42; 2 R. R. 14; 10 Am. & Eng. Encyc. Law (1st ed.), 18; 7 Mews' E. C. L. 1405; *cited*, Bisph. Eq. 80, 84; Sto.; 2 Pom. 1037; 2 Dev. Deeds, 1168, 1172; Per. Trusts; 1 Beach, Eq. 215-234. *Cited*, § 150, Hughes' Proc.
Dyer v. Dyer stated: Simon D. bought and paid for lands and took a deed to himself, his wife and son, creating an estate of joint-tenancy, where the survivor takes all. Mrs. D. died, and next Simon, but he first devised all his interests to plaintiff, who insisted that the son, E., was only a trustee, he holding the legal estate, while the equitable was in the father, the purchaser. *Held*, that but for the relationship it would be a resulting trust, but E. took the property beneficially as an advancement, he being a son. Ducie v. Ford (1891), 138 U. S. 587, 1 So. Dak. 336, 26 Am. St. 799, n.
Trusts; resulting trusts; party paying purchase money; advancements. It is presumed that a party paying for a thing

Dyer.—
intends to become its owner, and it matters not that the title is taken in the name of another. Dyer: *Expressio eorum.*
Right to pursue and recover trust funds. Union National Bank, 138 Ill. 127, 32 Am. St. 119-130, ext. n., 2 Sto. Eq. 1258.
Deed to one, purchase money paid by another. 2 Dev. Deeds, 1146-1190. Resulting trusts, generally; Bigl. Fraud, 107-120; 4 Kent, 306; 1 Beach, Eq. 215-254; Edwards v. Culbertson (1892), 111 N. C. 342, 18 L. R. A. 204, n.; 21 Cyc. 973-1001.
DYING DECLARATIONS: S. v. Meyer (1900), 65 N. J. L. 237, 86 Am. St. 634-668, n.; Worthington, 92 Md. 222, 56 L. R. A. 353-357, ext. n.; McClain, C. L. 425-431; Gillett, Indirect Ev. 192-206; 1 Gr. Ev. 156-162; 2 Am. Crim. Rep. 11-13; 3 *id.* 220-224 (when part of the *res gestæ*); 10 *id.* 282, 283 (admissibility of); 3 *id.* 225; 4 *id.* 152 (must have been made *in extremis*). 12 Am. Cr. Rep. 228; Gipe v. S. (1905), 165 Ind. 433, 1 L. R. A. (N. S.) 419-423, n.; 12 Cyc. 429-432; 1 Ell. Ev. 313-314.
EARNEST: *See* FRAUDS AND PERJURIES; STATUTE OF FRAUDS; 1 Bouv. 629-631; And. Dic.
EASEMENTS: See Smith v. Thackerah; Humphries. Damages to. Story v. R. R.; 2 Wat. Tres. 823-829; Add. Torts; 5 Mews' E. C. L. 1054-1192.
Cities liable for disturbing. Nichols, 40 Minn. 389; 12 Am. St. 743; Gould, Waters, 299-323; Wood, Nuis.; 1 High, Injunc. 846-896; 10 Rul. Cas. 1-314; Cool. Torts; Bish. Torts; Wash. R. P.; Goddard, Easements. Drainage; statutory regulations. 7 Encyc. Pl. & Pr. 269-225.
Ways; appurtenances; right of assignee of land to. Ackroyd v. Smith (1850), 19 L. J. C. P. 315-320; 10 C. B. 164 (70 E. C. L. R.); 10 Rul. Cas. 1; 5 Mews' E. C. L. 419. *See* APPURTENANCES.
Disturbance of water-courses. Moak, Und. Torts, 448-478; Chasemore; 19 L. R. A. 93, 25 Kan. 588, 37 Am. Rep. 265; Gould, Wat. 284; 2 Wat. Tres. 855; Bro. Max. 198; 2 Gr. Ev. 230; Cool. Torts; Wheatley v. Baugh (1856), 25 Pa. 528, 64 Am. Dec. 721, ext. n.; Wheelock v. Jacobs (1897), 70 Vt. 162, 67 Am. St. 659-672, ext. n.; Perry v. Worcester (1856), 6 Gray (Mass.), 544, 66 Am. Dec., ext. n.; Dill. Mun. Corp.; Beach; Allen v. Boston (1893), 159 Mass. 324, 38 Am. St. 423, n. (sewers: liability for defects and failure to repair); Rochester, *sub* Hill v. Boston. *Sic utere tuo*, etc.
EASTWOOD v. KENYON: L.C. 336.
EAVESDROPPING: 2 Bish. Cr. Proc. 112-213; And. Dic.
EDDY-BISSELL CO.: L.C. 136.
EDGERTON v. BROWNLOW (1853), 4 H. L. Cas. 1; 7 Eng. Law & Eq. 170; 1 Sim. (N. S.) 464; 10 Eng. Reprint, 359; Greenh. Pub. Pol.; Mech. Pub. Off.; Bro. Max.; Bish. Conts. 476; 1 Kent, 304; 1 Mews' E. C. L. 350; 3 *id.* 2120, 2121, 2126; 4 *id.* 1001; 14 *id.* 370, 372. *Cited*, § 101, Hughes' Proc.
Conditions in wills contrary to public policy. *See* Scott v. Tyler: cases; Perrine, *sub* Sbelley; Smith, Con. 241.
EDUCATION: A leading purpose of government. § 52, Hughes' Conts. § 226, Hughes' Proc.
The mandatory record, its design, uses and purposes are educational. § 27a, Hughes' Conts.; *Ignorantia legis; Caveat.*
Every man is presumed to know the law, and the effect of records supporting an adjudication. Clarke; Bro. Max. 715; § 3, Hughes' Conts. See *Caveat emptor;*

Education.—
CONSTRUCTIVE NOTICE; *Ignorantia legis.*
EDWARDS v. ALLOUEZ: L.C. 282.
EDWARDS v. BAUGH (1843), 11 M. & W. 641, 1 Langd. Cas. 314; Bro. Max. 747, 748; 2 *id.* 1018, 1033; 4 Mews' E. C. L. 108, 109. *See* Longridge. Forbearance as a consideration. § 122, Hughes' Conts.
EDWARDS v. KEARZEY: L.C. 286.
EIGHT-HOUR LAW: Validity of. Millett v. P.: cases; McClain, C. L. 55; Suth. Stat. (whether class legislation).
EI INCUMBIT PROBATIO QUI DICIT, non qui negat: The burden of the proof lies upon him who affirms, not him who denies. Dig. 22, 3, 2. *See* BURDEN OF PROOF; L.C. 185; Cothran; *Actore,* etc.; *Affirmanti non,* etc.; *Semper,* etc.; Labatt, Master and Servant 832; 2 Cool. Tax. 922-926.
EISEMAN v. S (1895), 49 Ind. 5. *Mandatory record* must show the issue, else a trial is unauthorized and void. Crain.
EJECTMENT: Aslin; 3 Suth. Dam. 991-1007; 1 Bouv. 636-638; And. Dic.; 15 Cyc. 1-246; 5 Mews' E. C. L. 1470-1530; 2 Gr. Ev. 303-337; 1 Chit. Pl. 209-221; 7 Encyc. Pl. & Pr. 260-359; King, *sub* TRESPASS TO TRY TITLE.
Pleadings and proofs. Pennoyer. *What defenses may be pleaded.* Kirkpatrick v. Clark (1890), 132 Ill. 342, 22 Am. St. 531, n., 8 L. R. A. 571; Clyburn, 106 Mo. 521, 27 Am. St. 369, n.; Bell v. Brown. *See* Newell, Ejectment; Sedgk. & Wait, Trial of Title to Land; Tyler, Ejectment & Adverse Enjoyment; 15 Cyc. 90-200.
Complaint; sufficiency. Sufficient to aver as at common law, that one is owner and entitled to possession under code. Atwater v. Spalding (1902), 86 Minn. 101, 91 Am. St. 331, n.
General denial admits any defense, equitable or legal. Kelso, 65 Kan. 778, 93 Am. St. 308, n.
Possessory rights will not sustain an action of ejectment without showing the legal title. Cahill, 75 Conn. 522, 60 L. R. A. 706, n.
Res adjudicata; extent of the bar. Aslin.
Forcible entry and detainer. 2 Wat. Tres. 1168-1236; 9 Encyc. Pl. & Pr. 18-883; Lambert v. Robinson (1894), 162 Mass. 34, 44 Am. St. 326, n. (what amounts to forcible entry); Green: 90.
Writ of possession; what amounts to execution of. Lee Chuck v. Quan, etc. Co. (1889), 81 Cal. 222, 15 Am. St. 50-61, ext. n.
Forcible entry as a crime. S. v. Mills (1889), 104 N. C. 905, 17 Am. St. 706, n.; S. v. Davis (1891), 109 N. C. 809, 14 L. R. A. 207, n.; 2 Bish. Crim. Proc. 369-388; Taylor v. Cole: cases; *Salus populi suprema lex.*
EJUSDEM GENERIS: Of the same description. Bro. Max. 651; Suth. Stat. 422-441, 541, n.; 71 N. Y. 487; 9 Cyc. 886; 15 *id.* 247; Bouv., And. Dic.; Smith, Conts. 558, *citing* 7 B. & C. (14 E. C. L. R.) 660; S. v. Clark (1892), 21 Nev. 333, 18 L. R. A. 313, 12 *id.* 125; *Noscitur a sociis; Verba generalia,* etc. § 269, Hughes' Proc.
Prohibition of horse-racing, cock-fighting or playing at cards or games of any kind on Sunday does not include the game of baseball. Neet, 157 Mo. 527, 80 Am. St. 638 (*Verba intentione,* etc.); 98 Mo. 208, 8 Am. Crim. Rep. 312, n.; Burks v. Bosso.
ELECTION: Smith v. Hodson: Dash v. Van Kleeck: 156, 237*a*; *Consensus,* etc.; *Allegans,* etc.
If once made, is final and conclusive. § 180, Gr. & Rud.; *Allegans contraria,* etc.; Smith; Terry; And. Steph. Pl. 30-35. *Electa una via,* etc.; Auburn: 9. *See* DUPLICITY.
Electio semel facta, et placitum testatum, non patitur regressum: Election once made, and wish indicated, suffers not a recall. Smith v. Hodson: 156. It operates like waiver.
One must elect either to demur or plead to a statement. He cannot do both at the same time.
One cannot insist it is "fish, flesh or fowl," as suits the occasion. Kewaunee: 29. *See* THEORY OF THE CASE.
Election to accept one of two offices is a conclusive abandonment of the other. Bishop, 149 Ind. 233, 28 L. R. A. 278. *See* ABANDONMENT; 1 Bouv. 638-650; And. Dic.; 5 Mews' E. C. L. 1530-1592.
Alternative promises. 2 Wharf. Conts. 619-624.
ELECTION OF REMEDIES: A conserving principle of procedure. § 99*a*, Gr. & Rud.; Smith: 156; *Allegans,* etc. Remedies are favored, and in *ex delicto* wrongs one may sue all wrongdoers, and jointly or severally. (*Ex delicto* and *ex contractu* wrongs are defined in Cool. Torts, 2, 3, 90; 1 Chit. Pl.; Bouv. Dic.) The least participation in *ex delicto* wrong renders the participant a joint trespasser. Kirkwood.
All who embark in a common illegal cause incur a common liability, is a universal principle of non-contract law, applicable alike in torts and in crime.
1 Bish. C. L. 629; Spies; Cool. Torts, 133; 1 Wat. Tres. 23, 24; Moir v. Hopkins (1855), 16 Ill. 313, 63 Am. Dec. 312, 316, n.; Mech. Ag.; Huffc.; Sto.; Reinh.; Tiff.; 1 Suth. Dam. 140-142: cases; Losee: 210; 1 Kinkead, Torts, 40-64.
One member of a public board is liable for the torts of all. Sutton v. Clark; Bish. Torts, 521; 2 Add. Torts, 1321; Shear. & Redf. Neg.; Bro. Max.; Mech. Ag.; Sto. Ag.; Mech. Pub. Off.; Dill. Mun. Corp.; Beach, Pub. Corp.; Cool. Torts. And liable for the entire wrong. Cool. Torts 127. An election as to this is no defense to others not sued. Russell v. McCall (1894), 141 N. Y. 437, 38 Am. St. 807-820, n.; Warren v. Westrup (1890), 44 Minn. 237, 20 Am. St. 578, n., 4 L. R. A. 48; Burk v. Howley (1897), 179 Pa. 539, 57 Am. St. 607, n.; 131 Ill. 288, 300.
Successive recoveries can be had against joint trespassers. Lovejoy: 289; 12 Ind. Ap. 250, 54 Am. St. 522, n. But damages can be only once pocketed. Bish. Torts, 521; Valparaiso.
A choice of remedies is afforded a wronged person, e. g. he may waive a tort and sue in assumpsit.
Smith; Terry; Connihan v. Thompson (1873), 111 Mass. 270; *stated* in notes to Smith v. Hodson, Smith, Lead. Cas.; Kearney, 97 Iowa, 719, 59 Am. St. 434, n.; Jones v. Hoar (1827), 5 Pick. (Mass.) 285; *stated* Bliss Code Pl. 13, n., 154, 244, Keener, Quasi Conts. 159-214; 2 Beach, Conts. 647: cases; 7 Encyc. Pl. & Pr. 360-375; Agar v. Winslow (1899), 123 Cal. 587, 69 Am. St. 84; Bolton Mines v. Stokes (1895), 82 Md. 50 2 Am. & Eng. Cas. Eq. 173-207, ext. n. (choice of equitable remedies).

Election.—

If a wrongdoer seizes and converts property, his act may be ratified (2 Whart. Conts. 931), and he may be treated as an agent and sued for its value, and he is estopped from defending on the ground that his act was a tort—was a wrong not connected with a contract. *Nullus commodum capere*, etc. This principle of agency is the *ratio decidendi* in *Smith* and in *Jones, supra*, and this is adopted in all systems of procedure, with a constantly widening application. Bliss, Code Pl. 11-19. Cool. Torts, 95 (any conversion of property sufficient; *e. g.*, depasturing one's land).

In *Cutter* is presented a useful discussion of the right to abandon an express contract and sue upon an implied one. Like a ratification, an election once made is final and conclusive—is applied to the elector; to him attaches with strictness *Allegans contraria; Expressio unius*, etc.: The express mention of one thing implies the exclusion of all others. 184 U. S. 665. And this suggests the precision and certainty demanded in judicial procedure, which is so important to be comprehended. The high conserving principles are involved. These demand that some certain thing be described; in other words, a cause of action must be stated. *De non apparentibus*, etc.

See CERTAINTY; 1 Gr. Ev. 63, 2 *id.* 7, 3 *id.* 10; Sto. Pl., § 10.

Whatever form of wrong is selected, it must be, when described, one known to and defined in the laws of the land. Cool. Torts, 4. And its nature and character should be described with essential certainty. Bliss, Code Pl. 291, 3d ed. A distinct and definite theory must be adopted. Dovaston; *De non apparentibus*.

Waiver of lien by attachment or execution. Dix v. Smith (1899), 9 Okla. 124, 50 L. R. A. 714, n.

To elect intelligently between remedies one must know all. The consequences of failure to perceive the difference between contract and tort will clearly appear in Russell v. U. S. (1901), 182 U. S. 516; O'Neal v. U. S. (1903), 190 U. S. 36. *See* § 99*a*, Gr. & Rud.

ELECTIONS: Decision of the vote at election. State of Missouri, etc., v. Kramer (1900), 150 Mo. 89, 47 L. R. A. 551, n. *Marking official ballot.* Hope v. Flentge (1897), 140 Mo. 390, 47 L. R. A. 806-841, ext. n. Right of electors to vote for a candidate whose name is not printed on the official ballot. Chamberlain v. Wood (1901), 15 So. Dak. 216, 91 Am. St. 674-688, ext. n. (right of suffrage is not a natural or civil right). *What irregularities will avoid.* Patton v. Watkins (1901), 131 Ala. 387, 90 Am. St. 43-92, ext. n. Generally: 5 Mews' E. C. L. 1-218; 15 Cyc. 268-465.

ELECTRICITY: Negligent use of. *See* Fletcher; Squib Case; 15 Cyc. 466-480.

ELEVATORS: Liability for. Ingalls: 353.

ELIASON v. HENSHAW: L.C. 330.

ELISORS: May be appointed, if sheriff is a party.

Court has inherent power to appoint. Expressio eorum, etc.; And. Dic.; P. v. Ewbanks (1898), 117 Cal. 652, 40 L. R. A. 269; 3 Bl. Com. 354; 5 Bac. Abr. (Elisor); Tidd's Prac.; Crocker on Sheriffs, 2, 951; Guynne, 29; S. v. Townley: 225*a*.

ELLIS v. ESSON: L.C. 389.

ELLIS v. SHEFFIELD, *sub* Hilliard.

ELLIS v. U. S. (1907), 206 U. S. 246-267. *Statement of case:* Ellis took a contract from the government to deepen Boston Harbor within a certain time. This was a "public work." A statute forbade the employment of any "laborer or mechanic" on a public work to labor more than eight hours. To complete the work on time Ellis hired laborers and mechanics to labor *nine* hours. For this he was indicted and convicted. *Salus populi suprema lex.*

Further, he allowed ordinary seamen to work as "laborers and mechanics," for which he was also convicted.

From these several convictions he appealed, and all of the cases were reversed except one, *namely*, the first above mentioned. It was held no crime to employ the seamen as "laborers and mechanics." JJ. Moody, Day and Harlan, *dissenting*.

To finish the work on time was held "no emergency" of justification. Belief of the accused that it was an emergency was no defence. Breaking the law constituted a crime regardless of his intention, also of his belief in his justification.

The act constituted the crime. *Actus non facit reum nisi mens sit rea* does not apply in all cases. R. v. Prince; P. v. Robey (Mich.); C. v. Mash (Mass.).

Justice Moody denies that penal laws are strictly construed. "If this be so, then the rule of strict interpretation, applicable to penal laws, a rule which has lost all of its ancient rigor, if indeed it is now more than a lifeless form (U. S. v. Lacher, 134 U. S. 624, 628) cannot be used to take them out. Where the intention of the legislature is reasonably clear, the courts have no duty except to carry it out. The rule for the construction of penal statutes is satisfied if the words are not enlarged beyond their natural meaning, and does not require that they shall be restricted to less than that." P. 266.

See *Lex non exacte* also *Ita lex scripta est.* Burks: 217*a*; Harper: 218.

Penal statutes are strictly construed; remedial statutes are liberally construed.

ELLIS v. WIRE (1870), 33 Ind. 127. S. P., Bull v. Griswold.

ELMORE v. STONE: L.C. 409.

ELWELL v. SHAW (1819), 16 Mass. 42-46, 1 Am. Lead. Cas. 222-242, ext. n., 8 Am. Dec. 126; Mech.; Sto. Ag.; Chit. Conts.; Add. Conts.; Wash. R. P.; Wood, 6 Cush. 117, 52 Am. Dec. 771-777, n.; Whart. Ag.; Mech.; Huffc.; Wash. R. P. (how agent must sign a deed); 1 Warv. Vend. 227-229.

Cited, p. 40. §§ 112, 176, 186, 186*a*, 202, 225, Hughes' Proc.

Deeds must be certain, also commercial paper. L.C. 410; Wilks v. Back (1802), 2 East, 142; 6 R. R. 409, 8 Rul. Cas. 634-641, n.; 5 Mews' E. C. L. 374, 11 *id.* 1124; Combe's Case, 9 Coke, 76*b*; Davenport v. Parsons (1862), 10 Mich. 42,

Elwell.—
81 Am. Dec. 772-778, n. (construction of power of attorney).

ELWES v. MAW (or Mawe) (1802), 3 East, 38, 2 Sm. Lead. Cas. 191-245, ext. n.; 11th ed. (reviews English cases); 6 R. R. 523, 12 Rul. Cas. 193-227, n.; 7 Mews' E. C. L. 127 (Fixtures); Elwell, Fix. 463; Add. Torts; Bro. Max. 421, 428; 2 Kent, 340-348; Tyler, Fix.; Cobbey, Replev.; Cool. Torts; 1 Wat. Tres. 416; Pars.; Bish.; 2 Add. Conts. 650; Bisph. Eq.; 2 Dev. Deeds, 1191; 2 Wash. R. P. 27; 2 Wh. Ev. 863*a*, 19 L. R. A. 446; Binkley v. Forkner (1889), 117 Ind. 176, 3 L. R. A. 33, n.; Herm. Ex. 127-130; *Quicquid plantatur*, etc.; Bright. *Cited*, § 329, Hughes' Proc.

Elwes v. Maw stated: A farm tenant, for the convenient occupation of the leasehold premises, erected at his own expense a stable, a carpenter's shop, etc., which were of brick and mortar, and tiled, and were let into the ground. During his term he undertook to remove these. *Held*, he could not. There is a difference between annexations to the freehold for the purpose of trade and others made for the purpose of agriculture, and for better enjoying the immediate profits of the land.

Bro. Max. 428; Elwes; Overman v. Sasser (1890), 107 N. C. 432, 10 L. R. A. 722, n.; Fifield v. Farmers' Nat. Bank (1893), 148 Ill. 163, 39 Am. St. 166, n.; cases (machinery affixed becomes realty); Collamore v. Gillis (1889), 149 Mass. 578, 14 Am. St. 460, n. (baking oven affixed by tenant is a fixture); Gray v. Holdship (1828), 17 S. & R. 413, 17 Am. Dec. 680-696, ext. n.; Hobson v. Gorringe (1896), 66 L. J. Ch. 114-121, 12 Rul. Cas. 208-227, n. (mortgagor and mortgagee); Josslyn v. McCabe (1879), 46 Wis. 591, 18 Am. Law Reg. (N. S.) 711-715, n. (must remove during the tenancy); Bisph. Eq. 432, 1 Wash. R. P. 28; Morey v. Hoyt (1893), 62 Conn. 542, 19 L. R. A. 611, n. (right to remove).

Grantor and grantee. Hill v. Mundy (1889), 89 Ky. 36, 11 Ky. L. Rep. 248 (ice stored in ice-house of a hotel, sold in April, passes under a deed to the realty. *Expressio eorum*, etc.; *Verba intentione*).

General discussion of fixtures: rules stated. Chit. Conts. 497-500; 2 Add. (Mor. ed.) 650, n.; 6 L. R. A. 249, n.; 2 Dev. Deeds, 1191-1230; 44 Iowa, 57, 24 Am. Rep. 719-732, ext. n.; 17 Am. Dec. 680-696; Muir v. Jones (1892), 23 Oreg. 332, 19 L. R. A. 441-446, ext. n. (agreement against fixtures, attaching effect). *See* Jones, Mort., 12 Rul. Cas. 193-227, 9 Encyc. Pl. & Pr. 16, 17; Broaddus v. Smith (1898), 121 Ala. 335, 77 Am. St. 61, n. (agreement as to; when a tenant may remove). Effect of renewing the lease without reserving the right. 147 Cal. 351, 1 L. R. A. (N. S.) 1192-1203, ext. n.; Clayton.

EMBEKKLEMENT: Moore v. U. S. (1895), 160 U. S. 268, 10 Am. Crim. Rep. 283-291, n.; R. v. Negus; Grant v. S. (1895), 35 Fla. 581, 48 Am. St. 263, n., 23 L. R. A. 123; Calkins v. S. (1868), 18 Ohio St. 366, 98 Am. Dec. 121-174, ext. n.; P. v. Gordon (1901), 133 Cal. 328, 65 Pac. 746, 85 Am. St. 174, n. (essential elements); Eggleston v. S. (1900), 129 Ala. 80, 87 Am. St. 17-47, ext. n. (excellent *resume*); 1 McClain, C. L. 623-656; 2 Bish. Cr. Proc. 314-342; Bouv.; And. Dic.; 4 Mews' E. C. L. 1175-1205; 15 Cyc. 486-538.

EMBLEMENTS: Crosby v. Wadsworth.

EMBRACERY: 3 Gr. Ev. 100, 101; 2 Bish. Cr. Proc. 314-343; Bouv.; And. Dic.

EMERGENCY CLAUSE TO STATUTES; effect of omitting. Suth. Stat. 176.

EMERSON v. NASH (1905), 124 Wis. 369, 109 Am. St. 944, n., 70 L. R. A. 326, 102 N. W. 921; *cited*, §§ 40, 53, Gr. & Rud. *Rushton:* 5 and *Bartlett:* 6 reaffirmed: A cause of action must be described.

Pleadings; certainty required; test. Important rule.

Joinder of all causes arising from the same transaction is permissible. King v. Chi. R. R. (Minn.), 109 Am. St. 961, n. Brugger: 162.

"We cannot too often recur to the radical change wrought by the code from the common-law rule for determining the sufficiency of pleadings." 124 Wis. 379.

It is due to observe that if a pleading will serve the requirements of *res adjudicata* and of other conserving principles it is sufficient. Rushton; Bartlett; Cruikshank; Sto. Pl. 10; McCarty v. Hotel Co. (1898), 144 Mo. 397, 402; Chitty, 148 Mo. 64, 75, *ante;* Dovaston; *Verba fortius; Frustra probatur;* Campbell v. Greer: 2*a* (Mo.).

Convenience has always influenced and moulded the law. § 53, Gr. & Rud. Joining causes of action is more of a formal than a radical change.

EMINENT DOMAIN: The exercise of this power is a part of *Salus populi*, etc. The most widely cited cases relating to it are: *Kohl v. U. S.* (1875), 91 U. S. 367, 4 L. C. Am. R. P. 411, n., 2 Thayer, Const. Cas. 596; Brown, Jurisdic.; *Brown v. Beatty* (1857), 34 Miss. 227, 69 Am. Dec. 389, 4 L. C. Am. R. P. 384-495, ext. n.: *cited*, Suth. Dam.; Sedgk. Dam., Const. Lim.; Dill. Munic. Corp.; Sedgk. Stat.; 1 Bouv. 657-672; And. Dic.; Tiedeman, Pol. Power. The right to interfere with ingress, egress and property in streets is extendedly reviewed, and the right of the property owner ably asserted, declared and protected in *Story v. N. Y. El. R. R.*, q. v., with cognate cases. *Eachus v. Los Angeles, etc Ry.* (1894), 103 Cal. 614, 42 Am. St. 149-158, n.; 130 Cal. 492, 80 Am. St. 147, n. (damage from grading or changing grade); 44 *id.* 157, 15 Cal. 653, 56 Am. St. 155; O'Brien v. Philadelphia (1892), 150 Pa. 589, 30 Am. St. 852-860, ext. n.; Pueblo v. Strait (1894), 20 Colo. 13, 46 Am. St. 273, 24 L. R. A. 392 (obstructing ingress and egress); Davis v. Missouri Pac. R. R. (1893), 119 Mo. 180, 9 Am. R. R. & Corp. Rep. 117-123, n.; Columbus Gas Light Co. v. Columbus (1893), 50 Ohio, 65, 19 L. R. A. 510, n.; Searle v. Lead (1898), 10 S. Dak. 312, 39 L. R. A. 345. *Generally:* Lewis; Mills; Goddard, 84 Me. 499, 30 Am. St. 373-413, ext. n. (changing grade of streets); Lockwood v. Wabash R. R. (1894), 122 Mo. 86, 43 Am. St. 548-558, 24 L. R. A. 516 (city cannot authorize railroad to take the streets); Field v. Barling (1894), 149 Ill. 556, 41 Am. St. 311-329, ext. n., 24 L. R. A. 406, n.; McQuaid v. Portland Ry. (1889), 18 Oreg. 237, 1 Am. R. R. & Corp. Rep. 34-54, ext. n. (Any damage to egress or ingress of street is actionable); 104 Cal. 186, 25 L. R. A. 654, 10 Am. R. R. & Corp. Rep. 25-39, n. (railroad in streets).

Eminent Domain.—

In Barron v. Baltimore, the great rule of construction was applied; that the constitution did not apply to the states, except where they were named to be bound.

Elements of damages. Board, 192 Ill. 47, 85 Am. St. 288-314, ext. n. Damaging property, what is. 39 Wash. 355, 109 Am. St. 889-917, ext. n.

Public use; question of may be considered by court, when. Chicago Ry. Co. v. Morehouse (1901), 112 Wis. 1, 88 Am. St. 918-946, ext. n.; Brown v. Gerald (1905), 100 Me. 351, 70 L. R. A. 472.

Exercise of power of eminent domain for water supply. Stearns v. Barre (1901), 73 Vt. 281, 58 L. R. A. 240, ext. n.; 102 Am. St. 805-839, n.

Drainage; who liable for expenses of. Heffner, 193 Ill. 439, 58 L. R. A. 353-371, ext. n.

Procedure for the establishment of drain and sewers. 87 Minn. 325, 60 L. R. A. 161-189, ext. n.

EMPLOYEES: Protection: Millett.

EMPLOYER'S LIABILITY ACT: 2 Thayer, Const. Cas. 596; Bouv. Dic.; 9 Mews' E. C. L. 924-954; Yarmouth; Reedie, Hilliard, was upon a statute. Dresser, Employer's Liability Acts (1902). *See* Reinh.; Huffc. Ag.; Labatt, Mas. & Serv.; *Actio personalis*, etc.

ENGLAND; JUDICATURE ACT OF: *See* EQUITY, Hughes Proc.; tit.: EQUITY. §§ 18, 150, 151, Gr. & Rud.

ENGLISH LANGUAGE: Pleadings shall be in, is a usual code provision. From an educational standpoint this is a wise provision.

The whole public are interested in judicial proceedings and therefore they should be expressed in the prevailing language. *See* CONSTRUCTIVE NOTICE. § 53, Gr. & Rud.

ENGROSSING: 2 Bish. Cr. Proc. 346-350.

ENTICING AND ALIENATING: Lynch.

ENTIRE CONTRACTS: Right to abandon and sue on a *quantum meruit*. *See* Cutter v. Powell: 308.

ENTIRE ESTATES: Crew. Effect of recent statutes. 60 Neb. 663, 83 Am. St. 550 (*Cessante ratione*, etc.); 154 Ind. 83, 48 L. R. A. 234, n.

ENTIRETY OF THE LAW: §§ 1, 2, 82, 176-182, 257-261, Gr. & Rud. *Uno absurdo dato infinita sequuntur*, is a maxim that may be cited for the entirety of the law. Consequently appears the importance of the rule that absurdities are excluded in construction. Suth. Stat. 367, 376, 408, 484, 489-490. *See* ADJECTIVE LAW; SUBSTANTIVE LAW; pp. 23, 31, 35-43, §§ 5-5*b*, Hughes' Proc.; Tex. R. R. v. Humble.

ENTRAPMENT. 12 Am. Rep. pp. 279-283; P. v. Mills (1904), 178 N. Y. 274, 67 L. R. A. 131; 12 Cyc. 160.

ENTRY: Writ of. 15 Cyc. 1057-1084.

ENUMERATIO UNIUS. See *Expressio unius*. Enumeration of one thing excludes all others.

EQUAL AND UNIFORM LAW: Demands certainty. Declared for in Civil Rights Act. §§ 1979-1981, R. S. U. S. *See* CIVIL RIGHTS; DUE PROCESS OF LAW; CONSTITUTIONAL LAW; 8 Cyc. 1058-1080.

Justitia nemini neganda est: Justice is denied no one.

Is guaranteed from all state agencies and powers, and not from the legislature alone. Nashville R. R., 86 F. R. 168: cases; Santa Clara Co., 18 F. R. 385; Dash: 237*a*; Bro. Max. 63, n. *See* CONSTITUTIONAL LAW; UNIFORM LAW; Goodrich; Strauder; 201 U. S. 256; P. *ex rel.* Armstrong v. Warden.

Equal.—

EQUALITY IS EQUITY: *See* EQUITY.

EQUAL PROTECTION UNDER THE laws. Construction of; federal constitution. Williams, 170 U. S. 213; Brown v. Tharpe; S. v. Warden. *See* CIVIL RIGHTS; Blake; McClain, C. L. 77; CONSTITUTIONAL LAW; EQUAL AND UNIFORM LAW.

Uniform law essential for procedure. Indianapolis; O'Connell: 224; L. C. 222, 223. §§ 83-123, Gr. & Rud.

EQUITABLE CONVERSION: *"Equity looks on that as done which ought to be done." Resulting trusts; reconversion; Ackroyd v. Smithson* (1780), 1 Brown, C. C. 503, 1 Lead. Eq. Cas. (W. & T.) 1171-1205, ext. n., 28 Eng. Reprint, 1262: cases, 7 Rul. Cas. 8, 4 Mews' E. C. L. 415, 6 Gray's Cas. Prop. 516, Laws. Lead. Eq. Cas. Simp. 41, 1 Pom. Eq. 155, 2 *id.* 1170-1171, Bisph. Eq. 88, 815-817, 2 Sto. Eq. 790-793, 1 Perry, Trusts, 160, 2 Kent, 230; Howard v. Peavey (1889), 128 Ill. 430, 15 Am. St. 120, n.; Ford v. Ford (1887), 70 Wis. 19, 5 Am. St. 117-143, ext. n.; 1 Beach, Eq. 511-537; *Fletcher v. Ashburner* (1779), 1 Brown, C. C. 497, 1 Lead. Eq. Cas. 1118-1205, ext. n., 28 Eng. Reprint, 1259, 4 Mews' E. C. L. 275, 6 Gray, Cas. Prop. 512, 9 Rul. Cas. 1-65, 1 Beach, Eq. 521-537; Pom., Sto., Bisph., 1 Adams; 1 Wash. R. P. 31, 166.

By representatives of an estate buying real estate, it is treated as personalty. Lockman v. Reilly (1884), 95 N. Y. 64.

EQUITABLE ESTOPPEL: Great development of. §§ 185, 258, Gr. & Rud. Morality dictates. § 52, *id. Allegans contraria*, etc. *Applies in procedure.* Bailey: 44; Horn v. Cole; Pickard v. Sears. §§ 11, 41, Hughes' Conts. §§ 181, 185, Hughes' Proc.

Development of; origin. Lickbarrow: 394.

Must be pleaded. Davidson v. Jennings (1900), 27 Colo. 187, 83 Am. St. 49, 115; Wright: 28: cases.

If truth is known to both parties, or if they have equal means of knowledge, neither can be estopped. Bright v. Allan, 203 Pa. 394, 93 Am. St. 769, n.; Jenkins v. Long: cases; Ellis v. Newbrough, *sub* Horn (an amusing and instructive case—estoppel *in Tae*).

EQUITABLE EXCEPTIONS TO THE statute of frauds. Lester: 341.

EQUITABLE ISSUES: Are first tried. Pom. Rem. 86: cases; Hughes v. Dunlap (1891), 91 Cal. 385; Graver v. Faurot. *See* Ridgway v. Herbert (1899), 150 Mo. 606.

EQUITAS SEQUITUR LEGEM: *See* EQUITY.

Equity acts specifically. Bisph. Eq. 48. *See* SPECIFIC PERFORMANCE.

Abhors a multiplicity of suits. 1 Pom. Eq. 260. *See* Brugger; BILLS OF PEACE.

Evidence in proceedings in equity. 3 Gr. Ev. 249-385; note, 10 L. R. A. 617.

Equity jurisdiction may be sustained upon the ground that it affords the most convenient remedy. Conemaugh Gas Co., 186 Pa. 443, 65 Am. St. 865, n.; Lough: 293.

Equity of redemption; nature of. Bouv. Dic.; Howard v. Harris.

Equity will not require that to be done which if done would be useless. 67 Ill. Ap. 31. *Lex neminem, cogit*, etc. Vain and fruitless things are not required.

Equity delights to do justice, and that not by halves. 5 Story, Eq. Pl. 17; Brugger.

Where there is a plain, adequate remedy at

Equitas.—
law equity will not interfere. Anderson v. Eggles (1901), 61 N. J. Eq. 85, 55 L. R. A. 570.
Injunctive relief equity's chief protection. Vicksburg Water Works Co. v. Vicksburg (1902), 185 U. S. 65.
Equity and code pleadings analogous. Sturges. *See* CODES.
EQUITY: Blackstone did not understand. § 14, Gr. & Rud.
Conceived from maxims. §§ 40, 152, *id.*
Its maxims. §§ 40-44, 70, *id.*
Development of. §§ 17-18, 21-22, *id.*
Codes are analogous to and follow. §§ 140, 142, 146, *id.* *See* CODES.
Represses fraud. § 40, *id.* *Dolus.*
Contracts involve. § 26, Hughes' Conts.
Power to compel attendance of witnesses is derived from. 4 W'gm. Ev. 2190.
Equity regards that as done which ought to be done (Aequitas factum habet quod fieri oportuit). 1 Pom. Eq. 364-377, Bisph. 44; EQUITABLE CONVERSION; 16 Cyc. 135.
Equity looks to matter rather than to form. 1 Pom. Eq. 378-384, 1 Sto. 64*g*; 16 Cyc. 134. See *Fabula non judicium.*
He who seeks equity must do equity. 1 Beach, Inj. 16, 3 Pom. Eq. 1407, High, Injunc. 497; McClure v. Little (1897), 15 Utah, 379, 62 Am. St. 938; Hauswirth: 51.
He who comes into equity must come with clean hands. Collins; 1 Pom. Eq. 397-494, Bisph. 42; Edwards: 282; Beach, Inj. 14-16, 431, 791-793, 809, 893, 1128; Seabury: 281; *In pari delicto*, etc.; Coleman Co., 103 Ga. 784, 68 Am. St. 143 (one doing wrong cannot complain of another). *See* Bull v. Griswold; Cutter: 308; CHRISTIANITY.
Equality is equity. 1 Pom. Eq. 405; Bisph. 41; 1 Sto. 64*b*, 773; Francis Max. 3.
Mutuality is equity. Cooke v. Oxley: 321. *See* ESTOPPEL.
Where there are equal equities the first in time shall prevail. 1 Pom. Eq. 413-415, Bisph. 45, 1 Sto. 64*c*. *Qui prior est tempore, potior est jure.* Kern v. Hotaling (1895), 27 Or. 205, 50 Am. St. 710, n.
Where there is equal equity the law must prevail. 1 Pom. Eq. 416, 417, Bisph. 40, note 50 Am. St. 710.
Equity aids the vigilant. Vigilantibus, etc. *See* LACHES: LIMITATIONS; Bisph. Eq. 39, 1 High, Injunc. 7, 10; DELAY; MAXIMS.
Equity imputes an intention to fulfill an obligation. 1 Pom. Eq. 420-422.
Equity will not suffer a wrong without a remedy. Ubi jus; Ashby: 273; Dority.
Equity follows the law. Aequitas nunquam contravenit legem: Equity never opposes the law. 2 Pom. Eq. 425-427, Bisph. Eq. 38, 1 Sto. 64; Boyd: 62.
Equity acts in personam. 2 Pom. Eq. 135, 170, 429, 1317, Bisph. 47; Penn: 275; Newton v. Bronson (1856), 13 N. Y. 587, 67 Am. Dec. 89, ext. n.
Equity attaching for one purpose attaches for all. Brugger: 162; C. v. Ferguson: 264.

There are many other maxims which might be classed as equitable, such as *Nullus commodum capere*, etc., *Qui sentit commodum*, etc., and *Allegans contraria*, etc. Such maxims have contributed to and influenced the law from the Civil Law, on through the year books and on down to the present time as numberless decisions will show. It can no longer justly be said that equity is an auxiliary branch of the law, for now it pervades the entire system. The feudal and middle age law is rather a branch.

Equity.—

Equity is written and taught from its maxims, and no subject is better written or taught or understood. To be sure its maxims are old and well worn, but then, they have worn best. *Melius petere fontes quam sectari rivulos* (it is better to seek the fountains than to wander down the rivulets). If a knowledge of the origin and course of the Rhine is sought, it is better to comprehend the glacial springs at its head, issuing from the highest Alps, than to study that river which loses itself in the mud banks of Holland, the sands and marshes of the Zuyder Zee and round about that region anywhere. The Rhine has 12,000 tributaries which cannot have the prominence and the attention that must be given the principal stream; should this be lost or mistaken there will result much injury and delay. As we would learn of a river so we must of the law.

No generally acknowledged principle of equity has caused more furious and ceaseless contention than has the maxim, *Lex non exacte definit, sed arbitrio boni viri permittit* (the law does not define exactly but trusts in the judgment and discretion of a good man). This maxim originates from equitable conceptions, it also introduces relations with the prescriptive constitution, as will be seen by reference to the cases cited with that maxim to illustrate it. Indeed, some of the latest authors on construction write it down that that maxim is obsolete. Suth. (Lewis) Stat. 587, 588. *See* CODES; End. Stat. 182. *Ita lex scripta est*, whether or not this maxim is obsolete; whether or not there is a prescriptive constitution founded thereon is a question of paramount importance to the student. The question involves considerations of whether the law must be studied from its fountains or is to be forever wallowed after in a marsh.

It is time that the exact position of equity and the unwritten constitution be settled; until then there must result the consequences predicted by Bacon, of which observations were made in previous sections. *See* also, Hughes' Proc. 592-601; herein

Equity.—
is also presented an outline of the English Judicature Act. 1 Bouv. Dic. 680-686; And. Dic. 406-410; Brown Jurisdic. 675, 754; 16 Cyc. 1-536.

Procedure, the unwritten constitution and equity must appear to the liberal constructionist as close affinities. For this view see §§ 83-123; CONSTRUCTION and the articles on CODES should be considered. See also, L.C. 214-233 and cases cited therewith.

The maxims of the law often operate as a prescriptive constitution. S. v. Sheppard (Mo.).

Equity procedure is a system that strictly requires essential allegations and true and bona fide pleadings (§§ 10, 473 Sto. Pl.) and that the statement be proved as laid. It strictly rejects variances. It respects estoppels; and it respects and vindicates, and, above and beyond all, defends the mandatory record from fraud and usurpation. That record has no rightful existence in equity unless it is conformable to requirements of *Audi alteram partem*, or due process of law.

The contributions and influence of equity and its maxims upon our jurisprudence are incalculable. Were these withdrawn, then it would be in order to ask, what is there left? Accordingly may be seen the influence of a few brief maxims. They are the acorn from which has grown a giant oak.

Equity is liberally construed and is constantly widening. Big Six Co., 138 Fed. 279, 1 L. R. A. 332-341, ext. n.; Dority; PRIVACY; Lough: 293. See *Assignatus utitur jure auctoris; Boni judicis est ampliare jurisdictionem;* INJUNCTIONS.

Grounds and subjects. 16 Cyc. 1-29; Maxims 133-150; Laches and stale demands; Parties: Process and appearance: The original bill, 216-258; Pleadings in defence, 258-320; Replications, 320-324; Cross bill, 324-325; Amendment of pleadings: Supplemental bill, 357-362; Bills of review, 363-364; Signing and verifying pleadings, 365-379; Matter to be proved, 365-370; Rules of evidence, 387-403; Variances, 403-406; Hearing, 407-412; Submission of issues to jury and direction of action at law, 413-428; References, 429-459; Dismissals, 460-469; Decrees, 471-500; Proceeding to correct or vacate decrees, 501-534, 16 Cyc. 1-534.

EQUIVOCAL OBJECTIONS: Exceptions, motions for new trials; assignments of error are unavailing. *See* CERTAINTY; ALLEGATIONS; ASSIGNMENTS OF ERROR; Kraner: 299; *Expressio unius;* Miller: 290; §§ 173, 176, Hughes' Proc. *Equivocal pleadings.* Pain: 107; Roden: 12*b*; AMBIGUOUS. Construed against the pleader. Dovaston; *Verba fortius;* § 239, Hughes' Proc.

ERROR: In the mandatory record saves itself. Windsor: 1; §§ 8-12, 62, 66, 70, 88, Hughes' Proc.

When available without objection made or exception shown. Windsor: 1; Campbell v. P.: 2; Campbell v. Greer; §§ 63, 89, 95, 119, 124, 186, 233, 255, 268, Gr. & Rud.

Nullities need not be excepted to. Shutte: 291; *Quod ab initio. E. g.,* overruling a general demurrer. Mobley.

Error must be excepted to. See *Consensus;* Bram v. U. S., 168 U. S. 187, 10 Am. Cr. R. 547: cases; ABATEMENT; L.C. 290-299. § 53, Gr. & Rud. Exception must be apt. Shutte: 291. *See* ASSIGNMENT OF ERROR. Exception; where public policy is involved. Shutte: 291; *See* SOVEREIGNTY; Mobley; Campbell v. P.

Error is presumed prejudicial until the contrary is shown. Smuggler Co., 25 Colo. 16, 71 Am. St. 106, n. It must be assigned. *See* ASSIGNMENT OF ERRORS; § 12, Hughes' Proc. But need not be to mandatory record defects. When immaterial. *De minimis; Actus curiæ. See* APPELLATE PROCEDURE; ABATEMENT.

Error must affirmatively appear. Verba fortius; Mercantile, 205 U. S. 298; L.C. 292-299.

ESCAPE: Must be on valid process. *Debile;* Bouv. Dic.; 6 Cyc. 537-547.

ESCHEAT: C. v. Hite (1835), 6 Leigh (Va.) 588, 29 Am. Dec. 226; Bouv., And. Dic.; 16 Cyc. 548-559.

ESCROW: Bouv. Dic. Escrow deed. *See* Welborn: 388; 1 Dev. Deeds, 312-333; 16 Cyc. 560-594.

ESKRIDGE v. GLOVER (1833), 5 Stew. & Port. (Ala.) 264, 26 Am. Dec. 344, n. *See* Cooke: 321; *cited,* § 46, Hughes' Conts.

ESTATES: 16 Cyc. 595-670.

ESTOPPEL: *Allegans contraria.* General resume. §§ 171-200, Gr. & Rud. Four kinds. *Id.* 172; maxims and cases. *Id.* 173. Not a federal question. *Id.* 151. Title to land may rest on. *Id.* 124*a*. Are odious. §§ 124, 124*b*, 174, 182, 223. *id.* Of record; rules. *Id.* 182. Attacks upon. *Id.* 191. Advance morality, *Id.* 52. Depend on a record. *Id.* 272. A branch of evidence. *Id.* 59, 124, 124*a*. How proved. *Id.* 124-132. A conserving principle of procedure. *Id.* 91.

The law of estoppel, and particularly all that relates to *res adjudicata,* also rules issuing from *Allegans contraria non est audiendus,* a maxim liberally applied, is involved in contract law. §§ 11, 41, Hughes' Conts.; Ewart on Estoppel. *See* Young v. Grote; Lickbarrow: 394. §§ 182, 183, Hughes' Proc.; 6 Cyc. 299, 306 (cancellation), 16 Cyc. 671-814.

(1) *Estoppel of record:* Kingston's: 76; Outram; Cromwell: 25, 26; Dickson: 34: cases.

(2) *Estoppel by deed: Christmas v. Oliver:* cases; Jackson; R. v. Inhabitants of Scammonden (1789), 3 Term. R. (D. & E.), 474-476, 1 R. R. 752, 14 Rul. Cas. 744 (real consideration may be shown); 5 Mews' E. C. L. 425, 6 *id.* 746, 10 *id.* 1148, 1169; Young; 16 Cyc. 685-719.

(3) *Equitable estoppel or estoppel in pais:* Horn; Pickard.

(4) *Estoppel from conduct before courts:* Bailey: 44; *Allegans contraria:* cases; *Consensus tollit errorem.*

Inconsistent positions in litigation are not permissible. 2 Black, Judg. 632; Bailey; Crain (limitations).

All estoppels must be pleaded. See *Res adjudicata;* Wright: 28: cases; Briggs v. Milburn (1879), 40 Mich. 512; Borkenhagen; 16 Cyc. 806-814; McKyring v. Bull (code—new matter must be pleaded): 81, 33. Freem. Judg. 284; Bliss,

Estoppel.—
Code Pl. 364; Consolidated Coal. §§ 181, 185, Hughes' Prcc.
The above rule has been the subject of much contention. Conflicting cases are abundant.
Estoppels of record are odious; they are strictly taken. Every presumption is against a pleader. *Actore,* etc. See *Res adjudicata; Verba fortius. Estoppel by verdict. Outram; Cromwell.*
The mandatory record is essential for: 1 Gr. Ev. 63; 2 *id.* 7; 3 *id.* 10; p. 9, Hughes' Proc.; Draper; CONSERVING.
Repugnancy in this record destroys the plea. Pain: 107. See *Res adjudicata.* Likewise ambiguity. Lea: 30. Consequently there appears the necessity for certainty of that record, and of all its parts, and particularly the pleadings.
An estoppel against an estoppel sets the matter free. See *Res adjudicata.* The last one binds.
Defense of must be pleaded with certainty. Bliss, Code Pl. 364; And. Steph. Pl. 188 (Tyl. ed. 316). *See* ABATEMENT; *Res adjudicata.*
Facts constituting equitable estoppel must be pleaded to make defense available. Center School, 150 Ind. 168, 173; Gaylord, 54 Neb. 104, 69 Am. St. 705; Hall v. Henderson; Wright.
By deed. Christmas.
A subsequently acquired title will feed the estoppel under some deeds. Partridge, 33 Me. 483, 54 Am. Dec. 633, ext. n.; Christmas. *See* DEEDS.
Judgments operate as. Ans. Conts. 316. See *Res adjudicata. Ostensible ownership.* Ewart, Estop. 228-522. Bentley.
Ostensible agency. Ewart, Estop. 238-529; Huffc. Ag.; Reinh.
Execution of documents. Ewart, Estop. 426-472; Williams v. Stoll; Young.
Estoppel by election. 2 Black, Judg. 678. *See* ELECTION; Smith: 156.
Equitable estoppel; elements of. Wampol, 14 So. Dak. 334, 86 Am. St. 765; Ewart, Estop.; Pasley: 375.
Estates in land pass upon equitable estoppel. Lindsay, Ewart, Estop. 206, 69 L. R. A. 584.
Corporations are estopped. Tulare Irr. Dist., 185 U. S. 1.
Married women; liberal rule. Hunt v. Reilly, 23 R. I. 471, 59 L. R. A. 206, n.: cases.
Agency by estoppel. *See* Mech. Ag., Huffc., Tiff. *Contracts founded upon.* Ewart, Estop.; Huffc. Ag. 65, 66, 128-135; Moller v. Gates; 1 Page, Conts. 50; 16 Cyc. 719-805.
Generally: See Bouv., And. Dic.; Bish. Conts. 264-311; 6 Mews' E. C. L. 361-492. *See* ORAL EVIDENCE; USAGE; Ans. Conts. 241-250; EQUITY.
ESTOVERIA SUNT ARDENDI, ARUNDI, construendi, et claudendi: Estovers are for burning, ploughing, building and inclosing. Estovers: Law of. 125 Ia. 259, 106 Am. St. 303-311, ext. n.
EUM QUI NOCENTEM INFAMAT, NON est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit: It is not just and proper that he who speaks ill of a bad man should be condemned on that account; for it is fitting and expedient that the crimes of bad men should be known. Dig. 47, 10, 17; 1 Bl. Com. 125; Harrison. *Salus.*
EVANS v. JOHNSON (1894), 39 W. Va. 299, 46 Am. St. 912, 23 L. R. A. 737. § 76, Hughes' Proc.
Fundamental principles annex themselves in construing a statute. Lex non exacte. See EQUITY. Dimes: 176; Windsor; L.C. 214-271. *Expressio eorum.* Notice is implied. *See* DUE PROCESS OF LAW.
EVANS v. JONES: L.C. 360.
EVANSVILLE v. MILLER (1897), 146 Ind. 613, 38 L. R. A. 161-174, ext. n.
Nuisances; municipal corporations. Power to declare a nuisance does not authorize that which is not such in fact to be so declared; to declare that a nuisance which is not, is void. *See* POLICE POWER; CONSTITUTIONAL LAW; Barbier. Municipal power over building and other structures as nuisances. Note, 38 L. R. A. 161; *Hill v. Boston.* Power over nuisances affecting safety, health and personal comfort. *Harrington v. Providence* (1897), 20 R. I. 233, 58 L. R. A. 305-325, ext. n.; *Darlington v. Ward* (1897), 48 S. C. 570, 38 L. R. A. 326-339, ext. n.; *Fisher v. McGirr; Salus populi suprema lex.* Nuisances relating to trade or business. *Ex parte Lacey* (1895), 108 Cal. 326, 38 L. R. A. 640-658, ext. n.; Slaughter House Cases; Fertilizing Co. Dominion over property subject to. *Salus; Sic utere tuo,* etc.
EVERSON v. SELLER (1885), 105 Ind. 266, 271. S. P., Bull v. Griswold.
EVERY ACT IS PRESUMED TO BE rightly, regularly and validly done. *Omnia præsumuntur rite;* Crepps; *see* Hughes' Proc., Max. No. 6, §§ 110-119, Hughes' Proc.; Galpin v. Page (18 Wall.); Hahn; 1 Gr. Ev. 34.
Presumptions of regularity will not supply jurisdictional facts. An authority must be pleaded and established. *See* AUTHORITY; JURISDICTION; Cruikshank: cases.
EVERY MAN IS PRESUMED INNOcent until he is alleged and proven guilty. Coffin; Bonnell: 185: cases; *Actore; Semper; Malum non præsumitur; Nemo præsumitur malus; Nihil nequum est præsumendum.*
Morality is a ground and rudiment of law. § 52, Gr. & Rud.
EVERY MAN IS PRESUMED TO KNOW the law. §§ 67, 272, Gr. & Rud. *Ignorantia legis neminem excusat* is the second ground and rudiment of law. § 48, Gr. & Rud. It is of universal application. Levett's Case; R. v. Esop; Williams v. Stoll.
EVERY MAN'S HOUSE IS HIS CAStle. See *Domus sua,* etc. Semayne's Case.
EVERY ONE IS PRESUMED TO INtend the natural, direct and probable consequences of his act. § 272, Gr. & Rud.; Scott (tort); Swift (commercial paper); Hadley (contract); P. v. Rogers; C. v. York (crime); Spies v. P.; P. v. Lawrence, 168 L. R. A. 193-223.
This rule rests on convenience and necessity, which are grounds and rudiments of law. § 46 Gr. & Rud.
EVERY PRESUMPTION IS AGAINST a judgment and its foundation record offered to prove an estoppel or title to property, real or personal. §§ 118, 124-133, 163, Gr. & Rud.; Clem v. Meserole; Pennoyer; Windsor; *see* AUTHORITY; JURISDICTION.
What was not *juridically* presented was not *judicially* considered.
EVERY PRESUMPTION IS AGAINST a pleader. §§ 175, 267, 272, Gr. & Rud.; *Verba fortius;* Hughes' Proc., Max. No. 19, §§ 215-222; Dovaston: 217; Cruikshank: 232; Moore v. C.: 21; Draper.

Every.—

This rule is applied in construing a judgment and its record above mentioned. It is most important and is most completely reviewed under citations to *De non apparentibus*, etc., and its cognates. §§ 118, 163 Gr. & Rud.

EVERY PRESUMPTION IS AGAINST a wrongdoer: *Omnia præsumuntur contra spoliatorem.* § 272 Gr. & Rud.; Hughes' Proc., Max. No. 33, §§ 110-119; §§ 316-319; Armory v. Delamire; 1 Gr. Ev. 34, 37.

EVERY PRESUMPTION IS IN FAVOR of the credibility of one speaking in extremities. *Nemo præsumitur ludere in extremis:* No one is presumed to trifle at the point of death. *See* DYING DECLARATIONS; *Res gestæ.*

EVERY WORD MUST BE GIVEN EFFECT to, if possible, in construction, 2 Suth. Stat. 380; 35 Wis. 516; *Verba aliquid operari*, etc. See *Ejusdem generis.*

EVICTION: *See* Royce; Bouv., And. Dic.; 2 Mech. Sales, 1796-1798.

EVIDENCE: Is a subject that may be likened to the river with its rise from glacial springs at Alpine crests, its numberless tributaries, and its flow to its delta in the sea, as was instanced in relation to EQUITY, *q. v.*, under which it was also observed that there were close relationships between the fundamentals of equity, the prescriptive constitution and procedure. Evidence, being a part of all those subjects, should be considered therewith, also upon the plan suggested by *Melius petere fontes quam sectari rivulos. See* EQUITY. To support these views attention is drawn to the matter presented in §§ 83-123, Gr. & Rud., the conserving principles of procedure. *See* also resume of §§ 269-272, Gr. & Rud. Also its distinctive titles in their alphabetical places; also, L.C. 46-85, 178-299: cases; also PRESUMPTIONS.

"What ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud. *See* ALLEGATIONS; Crain; Clem; Aylesworth: ORAL EVIDENCE; MANDATORY RECORD; Iverslie: 46; *Expressio unius;* 1 Gr. Ev. 275; Bailey, Jurisdic. 172b-174, 284-385, 454; Bro. Max. 180, 182, 347, 349, 601, 715; *Debile fundamentum*, etc.; Freem. Judg. 76. P. 14; §§ 1-12, Hughes' Proc.

Best evidence must be produced. 1 Gr. Ev. 82-97; Iverslie: 46-58, 17 Cyc. 465-467; ORAL EVIDENCE; 17 Cyc. 567-822; C. v. Kane: 183; *De non apparentibus;* §§ 74, 239, Hughes' Proc.

The law provides what shall evince an adjudication, and also for the making and conserving of that evidence. Iverslie; *Expressio unius.* § 91, Hughes' Proc.

Judicial notice cannot supply evidence. See JUDICIAL NOTICE; 16 Cyc. 849-924; ALLEGATIONS; *De non apparentibus; Debile fundamentum;* COLLATERAL ATTACK.

Nor can liberal construction. See CERTAINTY; CONSTRUCTION; *Verba fortius;* Dovaston: 217.

Evidence the leading idea in procedure. Outram: 25. See *Res adjudicata.*

Pleadings are probative in character. § 79, Hughes' Proc.; *Expressio unius;* Boileau: 43.

Estoppel of record depends on pleadings. See *Res adjudicata.*

Pleadings as a part of the subject. See PLEADINGS; RECORD; *Res adjudicata;* Boileau.

Allegata et probata must correspond. Bristow: 135. Relevancy. 16 Cyc. 1110-1146; *Expressio unius; Actore non probante;* Cruikshank: 232. § 5, Hughes' Proc.

Writings when required must be produced. Goss. *See* FRAUDS AND P.; Wain: 335.

Judgments must be proved by record. See JUDGMENTS; Clem.

Records if provided for must be produced. Iverslie; 1 Gr. Ev. 275, n.; Nixon; 2 Cool. Tax. 926; Mobley.

Inspection of documents. 17 Cyc. 290-296. Documentary evidence. *Id.* 296-465.

Mandatory record only evidence of adjudication. Res adjudicata.

Legislative journals must speak. See LEGISLATIVE; Suth. Stat. 29-54; *Expressio unius*, etc.

Burden of proof on him who claims under the mandatory record. 16 Cyc. 926-938; *Actore;* Campbell: 2; Windsor: 1; Clem: 2c. *See* AUTHORITY.

Admissions. 16 Cyc. 938-1050.

Unsworn statements; independent relevancy. 16 Cyc. 1146-1192. Unsworn statements—hearsay. 16 Cyc. 1191-1262. Character and reputation. 16 Cyc. 1263-1288. *Res inter alios.* 17 Cyc. 274-290*d*. Opinion evidence. 17 Cyc. 25-274.

A first and chief rule is the record rule, namely, "what ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud. Citations to this in the Index will indicate its importance throughout all governmental relations. It is often closely associated with *Expressio unius.* It is clearly presented in Planing Mill Co. v. Chicago: 2*d*, Crain, Campbell v. Greer: 2*a* and Mobley v. Nave: 46*a*. *See* ALLEGATIONS; *De non apparentibus; Frustra probatur.*

A *second* and important rule is, "every presumption is to be made against a pleader." Applications of this rule are led to from *Verba fortius, Dovaston* and *Cruikshank. See* EVERY.

"What ought to be of record must be proved by record and by the right record" (Planing Mill Co.: 2*d*) is closely associated with the following maxims, namely *Verba fortius*, etc., *Omnia præsumuntur rite*, etc., *Probatis extremis præsumuntur media, De non apparentibus*, etc., and *Frustra probatur quod probatum non relevat.* That rule and those maxims should be mastered by the student of procedure. L.C. 1-134 and cases therein cited present many phases of the above rules. American procedure is exceedingly diverse as to the application of those cases. Many of the discussions cited are "useless grists of profuse jargon" that amount to volumes. It seems a waste of energy to try to learn the datum posts from the vast accretions of case law not founded on true reckonings.

Files; one must look after his allegations and denials. McArthur: 99; Bro. Max. 715; Sto. Pl. 10.

Evidence.—

Burden on appellant to show error from exceptions record. L.C. 290*a*-299.

Or claimant of a tax or adjudication. Iverslie: 46; Draper. *See* TAXATION.

Presumptions; burden of proof deeply affects appellate procedure. See *Omnia præsumuntur.*

Presumptions affect pleadings: where the law presumes a fact it need not be alleged. 1 Chit. Pl. 221, 12th Am. Ed.; Green: 90.

Matters of evidence need not be pleaded. Green: 90; McCaughey: 184; And. Steph. Pl. 218; 1 Chit. Pl. 225, 12th Am. ed.; Sto. Pl. 252; Bliss Pl. 140, 206. It is surplusage. Matter of evidence is not changed by pleading it. Sto. Pl. 253.

Full faith and credit due the judicial records of each state. McElmoyle: 56.

The presumptions of regularity. Omnia præsumuntur. Most important in procedure. Sufficient evidence to sustain a judgment is presumed. Cothran.

Impeaching witnesses. See *Falsus.*

Presumptions from other transactions. See SYSTEM; Strong: 213*a*; P. v. Molineux; *Res inter alios acta,* Max. No. 37, §§ 334-342, Hughes' Proc.

Testimony of witnesses absent, dead, or subsequently disqualified. 16 Cyc. 1088-1110. See *id.:* PRISONERS.

No one is compelled to criminate himself. Nemo tenetur, Max. No. 39, §§ 349-353, Hughes' Proc. *See* CONFESSIONS.

Oral evidence. See *Id.;* Pym: 52; Woollam: 53.

Generally: Greenleaf; Elliott; Wigmore; Bouv. 701-708; And. Dic. 419-422; 6 Mews' E. C. L. 492-1118; McClain, C. L.; Bish. Cr. Proc.; 16 Cyc. 821-1288; 12 *id.* 1-822; 12 *id.* 379-496 (Crimes); 3 *id.* 1003-1009 (Arson); 6 *id.* 231-250 (Burglary); 7 *id.* 147-148 (Citizen). *See* various titles of evidence herein.

Preliminary definitions. 16 Cyc. 821-847.

Damages when presumed. Ashby: 273.

Recent possession of fruits of crime. R. v. Partridge: 190.

EXALL v. PARTRIDGE (1799), 8 Term Rep. 308, 4 R. R. 656, 9 Mews' E. C. L. 1316. *Cited,* § 52, Hughes' Conts., Smith, Conts. 196, 2 Whart. 762.

EXAMINATION OF WITNESSES. 1 Gr. Ev. 431-489; 2 Tay. Ev. 1028, 1232-1393; 1 Wh. Ev. 491-609; Bish. Cr. Proc., Whart., Clark; 8 Encyc. Pl. & Pr. 71-147, 3 Wigm. Ev. *See* separate titles of.

Of prisoners. Bouv., And. Dic.

Examining and committing officials not bound by special rules of pleading and technical requirements. 198 U. S. 1. *See* FEDERAL PRACTICE.

Court will not order, of an injured person. Austin R. R. v. Cluck, *sub* DEPARTURE.

EXAMINED COPY. Bouv. Dic. *See* COPY; C. v. Kane: 183.

EX ANTECEDENTIBUS ET CONSEQUENTIBUS fit optima interpretatio: A passage will be best interpreted by reference to that which precedes and follows it. Bro. Max. 577-587; 2 Whart. Conts. 662, Smith, 563; Boydell; M'Culloch: 147; Cohens: 244; Martin: 246; Barnard: 108; Bell v. Brown; Dickson; Lea; Pain; *Verba generalia; Ex procedentibus; Noscitur a sociis;* §§ 269, 272, 273, 275, Hughes' Proc.

EX CAUSA TURPI NON ORITUR actio: From one's own wrong arises no right. Sto. Eq. 296. See *Ex turpi; In pari delicto*; Thomas v. Whitworth, 3 Am. St.; Benj. Sales, 573; Holman: 363; Merryweather; *Crimen omnia; Ex maleficio. Cited,* §§ 92, 133-136, Hughes' Conts.

EXCEPTIO FALSI EST OMMIUM ULtima: A false plea is the basest of all things. *See* FALSE PLEADINGS: Graver: 103; *Ex facto oritur jus; Facta sunt;* Cutter: 308; *Fabula. Cited,* § 15, Hughes' Proc.

EXCEPTIONS. Exceptions must be apt and specific. § 53, Gr. & Rud. (convenience demands). Shutte: 291. When necessary for a review. § 63, Gr. & Rud. *See* ERROR; *Consensus;* Bram v. U. S., 168 U. S. 571, 10 Am. Cr. R. 547; Montgomery: 292; Lough: 293; 2 Bouv. Dic. 531 (Objection). §§ 66, 68, 88, 102, 156, 166, 173, 174, 325, Hughes' Proc.; 2 Cyc. 714; L.C. 123, 194, 296, 299.

Nullities need not be excepted to. Shutte: 291; Rushton: 5; Garland: 60; Bloom: 266. §§ 9-12, Hughes' Proc.; Perez: 2*e.*

Objections must be noted as well as an exception. 165 Ill. 302, 494.

Must be apt. Bram, 168 U. S. 571; *Consensus.* 102 Am. St. 158-164. *And specific.* Bram; Hickory: 194; Holloway v. Dunham (1898), 170 U. S. 615. See *Expressio unius;* ASSIGNMENTS OF ERROR; 19 Kan. 83, 9 Am. Neg. Cas. 355 (general insufficient); Miller: 290*b*; Shutte: 291; McDermott; Duvall; Dorn.

Notice of intention to seek a review, essential. Consensus; L.C. 290*a*-299; Bram.

Waiver of formal error condones it; it can no longer be an element for consideration. Shutte: 291.

Demanded by *Interest reipublicæ.* § 53, Gr. & Rud.

Implied exceptions are raised in defense of matters upon the mandatory record. Campbell: 2; §§ 1-12, Hughes' Proc.

Void things need not be excepted to. Campbell: 2; Shutte: 291; Rushton: 5; *See* Hume; Cooper; Bloom; 2 Cyc. 715.

In equity. 3 Gr. Ev. 249-385.

Exception to entry of judgment; held necessary in some jurisdictions. Percy Min. Co.

In statutory construction. Suth. Stat. 351-353. Exceptions in statutes; how pleaded. C. v. Hart: 227; Whart. Cr. Pl. & Prac. 238-241; U. S. v. Cook (1872), 17 Wall. 169, 12 Am. Law Reg. (N. S.) 682-698, n.

Error appearing from the mandatory record needs neither objection nor exception to preserve it; it will keep; otherwise that record would better be dispensed with. Windsor: 1; Williamson: 65; Guedel: 74*a*; McAllister: 3; Roden: 12*b*; Benton; Slacum.

Generally: Bouv. Dic.; BILL OF EXCEPTIONS; STATUTORY RECORD.

EX CONTRACTU ACTIONS: Cannot be joined with *ex delicto.* Kewaunee County v. Decker; Brugger v. State Investment Co.; Garland v. Davis. Codes provide what actions may be joined.

EX DELICTO ACTIONS: Cannot be joined with *ex contractu.* Garland v. Davis; Kewaunee County v. Decker; Sturges

Ex Delicto.—
v. Burton. *Ex delicto* and *ex contractu* causes; *important distinctions in attachment law.*
Waiving tort and suing in assumpsit. Smith v. Hodson.
EX DOLO MALO NON ORITUR ACTIO: A right of action cannot arise out of fraud. Bro. Max. 729-745; 17 Cyc. 874.
Cited, §§ 13, 28, 68, 96, 133-136, Hughes' Conts.; Max. No. 9, §§ 147-153, Hughes' Proc. *Cited,* §§ 5, 22, 29, 31, 42, 52, 116-123, 128, 147, 149, 150, 152, 167, 214, 307, *id.*
Cited, §§ 18, 38, 46, 52, 55, 62, 70, 91, 95, 124, 132, 151, 174, 220, 241, 258, 278, 288, Gr. & Rud. *See* FRAUD.
Involves fundamental grounds. §§ 46-70, Gr. & Rud.
The development of the maxims of morality, of the prescriptive constitution, has left slight footing for the operations of fraud and arbitrariness. Audi; Nemo debet esse judex; S. v. Sheppard; Keech v. Sandford.
Legislatures only can practice in their operations. See Pettibone; Fletcher v. Peck; Pabst Brewing Co. v. Crenshaw. Nor is there any remedy for the arbitrariness of supreme courts. Breeze; Rensberger, Hughes' Proc.; Lange: 159. Wherever supreme power is lodged there may be irremedial fraud.
"Due process of law" in all ages excludes fraud and arbitrariness; it will neither permit one to sit in his own cause, serve his own process or conserve the records wherein he has private interests. "Lead us not into temptation" is quoted and applied in S. v. Sheppard. *See* Keech v. Sandford; Montgomery v. S.; *Allegans.*
Judicial shams, frauds and mockeries are void. Windsor: 1; Needham: 261; Borden: 267; Banner; Furman: 262 (vacating judgments for); Ferguson: 264; Harshey (unauthorized appearance of attorney).
An acquittal secured by fraudulent means ought not be available for a plea of former jeopardy. Watkins: 269; *Nullus commodum capere; Ex dolo.*
One cannot prosecute himself. Watkins: 269; C. v. Alderman, 4 Mass. 477; C. v. Dascom, 111 Mass. 404; Warriner v. S., 3 Tex. Ct. Ap. 104, 30 Am. Rep. 124-126; 1 Bish. C. L. 1008-1111; note, 27 Am. Dec. 475; 1 Chit. C. L. 657; 3 Gr. Ev. 38. See *Res adjudicata.*
What cannot be done directly cannot be done indirectly. Quando aliquid prohibetur; Ilsley; Bull v. Griswold.
What is constructed of fraud justice will tear down. L.C. 312. *See* Rensberger, Hughes' Proc.; Kingston: 76.
Protection from fraud arises from the prescriptive constitution. Oakley: 222: cases; Trist: 214; S. *ex rel.* Henson v. Sheppard (Mo.).
Courts should protect a litigant from fraud and covinous practice. P. v. McCumber: 110; Dunlap; Graver; Borden; 1 Bailey, Jurisdic. 154-164; Needham. And set aside judgments and decrees founded thereon. Furman; Crowns (Code).
Vitiates an adjudication. Windsor; Needham; *Res adjudicata;* Graver; Ferguson; Hauswirth: 51; Bloom; Borden; Jackson, 1 Johns. 424; Fermor's Case, 4 Coke, 79*b*; Buchanan v. Reed, 9 East. 192: *stated* in Borden; S. v. Baughman: 268; Crowns.
Sham and false pleas give no rights. P. v. McCumber; Graver; Wonderly; Bailey, Jurisdic. 161; S. v. Baughman; Borden; *Exceptio falsi.* Judgments, decrees and orders founded on perjury will be set aside. Barr. *Are without merit.* See *Res adjudicata; Coram judice; Audi;* CAUSE OF ACTION; ALLEGATIONS; Weltmer.
Fraud upon justice cannot become the basis of a legal contract. See COMPOUNDING OFFENSES; Collins; Graver; Borden; Needham.
Fraud cannot become the basis of any right, not even of a contract. Collins.
Nor of protection from crime. Watkins.
Nor of an adjudication. Ferguson; Needham: cases; Hauswirth; Graver; Borden: cases; 1 Bailey, Jurisdic. 154-164.
Contracts in pari; Ex causa turpi. Pasley; Chandelor; *Caveat emptor;* Jenkins; Van Houten; Fitzsimmons: cases; Holman (illegality); Hegarty; Lickbarrow: 394; Swift (commercial paper); Le Neve: 396; 1 Benj. Sales, 636. *See* FRAUD.
EXECUTIO JURIS NON HABET INjuriam: The law will not in its executive capacity work a wrong. Bro. Max. 130-133; 1 Chit. Conts. 270; Dunlap; Green, Ilsley; *Jus et fraus nunquam inhabitant.*
EXECUTION: Definition. 17 Cyc. 921.
General nature and essentials. *Id.* 923-937.
Persons entitled to. *Id.* 937-939.
Persons against whom they may issue. *Id.* 939.
Property subject to. *Id.* 440-982.
Issuance, form and requisites. *Id.* 985-1049.
Lien levy, or extent and custody of property. *Id.* 1049-1135.
Stay, quashing vacation and relief against. *Id.* 1135-1198.
Claim by third persons. *Id.* 1199-1233.
Sale. *Id.* 1233-1365.
Return. *Id.* 1365-1586.
Payment; satisfaction and discharge. *Id.* 1387-1402.
Supplementary proceedings. *Id.* 1402-1489.
Execution against the person. *Id.* 1490-1569.
Wrongful execution. *Id.* 1570-1579.
They issue from a record, and are a part of it. See Six Carpenters' Case: 165; 17 Cyc. 788-1279.
Are an essential link in the proof of a title derived from a judgment. Pennoyer: 58; Ransom: 122; Douglas v. Whiting. And for justification defenses. See *id.*; S. v. Howard: 166. *Execution deeds.* 3 Dev. Deeds, 1425-1427. Are proved by the judgment and its foundation. Clem; 1 Whart. Ev. 824: cases; §§ 124-133, Gr. & Rud. Also by the execution, the levy, the sale and the deed. See CONSTRUCTIVE NOTICE; COLLATERAL ATTACK: cases; Windsor; Benton; Douglas; Williamson: 65; Horan: 85; Clem. *See* PLACITUM.
Must be returned for the record. Sub Six Carpenters'. Must conform to the record. 1 Freem. Ex., § 42. Variances liberally viewed. Ald. Jud. Writs, 51. Purchasers under, interested in. See *Caveat emptor.*
Execution protects the officer, if regular and fair upon its face. Savacool: 164: cases. Omission of debtor's name vitiates. Capps, 90 Tex. 499, 59 Am. St. 830, n.; Douglas; 1 Freem. Ex. 42. Must be signed, else they are void. Rawles, 104 Ga. 593, 69 Am. St. 185.

Execution.—

Generally: Bouv. Dic.; 6 Mews' E. C. L. 1118-1224. *See* Freeman on Executions; Herman; Ald. Jud. Writs; 17 Cyc. 878-1579.

EXECUTION SALES; upon what they depend. Notes, Lampleigh: 301; Hunt, 38 Cal. 373, 99 Am. Dec. 404; Ald. Jud. Writs; Pennoyer v. Neff: 58. See *Coram judice.* Depend on judgment, execution, levy and sale. Douglas; 1 Freem. Ex., § 42; Pennoyer.

Effect of redemption from. Lien of judgment with again attach. Flanders, 32 Oreg. 19, 67 Am. St. 504-517, ext. n.

Satisfaction of judgment when set aside. If a judgment creditor buys property at his own sale, and title fails because of the claim of a third person, he can have no such sale annulled. De Loach, 65 Ark. 467, 67 Am. St. 942, n.

Postponement — adjournment of — readvertisement. Fraaman, 64 Neb. 472, 97 Am. St. 650-662, n.

EXECUTIVE OFFICERS: Must act within their province. Savacool; Mostyn; Dennett; S. v. Baughman; 1 Bouv. Dic.

EXECUTORS AND ADMINISTRATORS: *See* ADMINISTRATORS; 2 Gr. Ev. 338-353; 1 Bouv. Dic.; 6 Mews' E. C. L. 1234-1896; 18 Cyc. 1-1367.

Administrators; executors de son tort. Rohn v. Rohn (1903), 204 Ill. 184, 68 N. E. 369, 98 Am. St. 185-205, ext. n.; Brown v. Sullivan. *See* ADMINISTRATORS. Non-residents may act when. 1 L. R. A. (N. S.) 341-352.

EXEMPLARY DAMAGES: *See* DAMAGES; Marzetti; Merest. Death of wrongdoer destroys right to. Morris, 126 Ga. 467, 115 Am. St. 105, n.; Spellman, 28 Am. St. 875; 13 Cyc. 120.

EXEMPTIONS: Simpson v. Hartopp; Kneetle; Edwards; Bouv. Dic.; 18 Cyc. 1369-1496.

Waiver: Exemption rights cannot be waived. Kneetle; *Modus;* Mills, 94 Tenn. 651, 45 Am. St. 763; Kneetle v. Newcomb (1860), 22 N. Y. 249, 78 Am. Dec. 186-190, n., 31 Am. Rep. 44; 94 Tenn. 656, 45 Am. St. 766, 1 Freem. Ex. 716; Simpson. *Contra:* Bowman, 31 Pa. St. 225, 22 Am. Dec. 738, n. *Of officers' salary from claims of creditors.* Dickinson.

Are liberally construed. Pickrell, 1 Ind. Ap. 10, 50 Am. St. 192; Suth. Stat. 352-356.

Joint owners in property may claim exemption. Stewart v. Brown (1867), 67 N. Y. 350, 93 Am. Dec. 578, n.; McCoy v. Brennan (1886), 61 Mich. 362, 1 Am. St. 589, 595, n.: cases. *Contra:* Wise v. Frey (1878), 7 Neb. 134, 29 Am. Rep. 380-382; Aiken v. Steiner (1892), 98 Ala. 344, 39 Am. St. 58, n.; *Re* Spitz Bros. Assignment (1896), 8 N. M. 622, 34 L. R. A. 604.

Exemptions are waived unless specifically claimed. 5 Colo. 397, 399, 1 Freem. Ex. 212.

Exemption from debt includes liabilities from tort. Mertz v. Berry (1894), 101 Mich. 32, 45 Am. St. 379-389, ext. n., 24 L. R. A. 789.

Rents, issues and profits of homestead property are also exempt. Morgan v. Rountree (1893), 88 Iowa, 249, 45 Am. St. 234-239, n.

Judgment from exempt property is also exempt from punishment. Crawford v. Carroll (1894), 93 Tenn. 661, 26 L. R. A. 415, n.

Insurance proceeds from exempt property are also, if to be invested as before. Puget, etc. Co. v. Jeffs (1895), 11 Wash. 466, 48 Am. St. 885, n., 27 L. R. A. 808.

How far exemption proceeds retain that character. Wylie v. Grundysen (1892), 51 Minn. 360, 19 L. R. A. 33-40, n.

Homestead. Partial use of premises for hotel, whether exempt. McDowell, 103 Cal. 264, 42 Am. St. 114, n. *Homesteads generally.* Thompson, Waples, Smythe; 1 Wash. R. P. 342-432, 1 Freem. Ex. 208-238, pp. 602-780. *Exemptions generally.* 1 Freeman, Ex. 208-238.

EX FACTO JUS ORITUR: The law arises out of the fact. Bro. Max. 102; Cool. Const. Lim. 58. *Cited,* §§ 15, 27, 30, 39, Hughes' Proc.; § 237, Gr. & Rud.

Facts must be pleaded; conclusions will not do. §§ 60-61, Gr. & Rud.

The law distinguishes between words and facts. Empty words do not confer jurisdiction. Wonderly: 102. And, analogously, a note or bill must have realities and a real consideration; empty words will not do. And a deed is also founded on realities. There can be no conveyance or sale of a thing not existing. *Ea quæ dari,* etc. No one can sell, convey or confer jurisdiction of a thing not in existence. *A l'impossible nul n'est tenu; Ex facto jus oritur.* See *Facta sunt potentiora verbis; Fabula,* etc.

Parties and allegations essential for a court to act upon. Windsor; Avon Case. *See* DESCRIPTION; CONCLUSIONS OF LAW; S. v. Baughman: 268; *De non apparentibus.* §§ 12, 17, 21, 26, 27, 27*a*, Hughes' Conts.

A change of facts will change the law, *e. g.,* if the sheriff had demanded that the door be opened, this would have changed the result in *Semayne's Case. Modica circumstantia,* etc.

EXHIBITS; function in code pleading. It cannot aid in allegation. Estate of Cook (1902), 137 Cal. 184; Cave v. Gill (1901), 59 S. C. 256; Hartford Ins. Co. v. Kohn (1893), 4 Wyo. 364; Hudson v. Ins. Co. (1901), 40 Ky. 722 (may be a part); Gardner v. Ins. Co. (1903), 25 Ky. Law R. 426 (may prejudice but not benefit a pleader); 2 Mich. Law Rev. 401 (conflicting cases).

If possible an exhibit should be inserted in a pleading above the signature and verification. Then it will best serve constructive notice, collateral attack and certainty. But there may be cases when it must be incorporated by reference, or, to avoid prolixity, be annexed.

How to set forth exhibits. *See* COPIES; *Verba relata,* etc.; Waverton: 70.

EX MALEFICIO NON ORITUR CONtractus: A contract cannot arise out of an act radically wrong and illegal. *No right comes through a crime. Crimen omnia,* etc.; *Ex turpi,* etc.; *In pari delicto,* etc.; *Ex pacto illicito.*

EX NUDO PACTO NON ORITUR ACTIO: No cause of action arises from a mere or bare promise. Bro. Max. 745-768. *See* CONTRACTS; CONSIDERATION.

Cited, §§ 33, 280, 283, 313, Gr. & Rud.

Phases of this maxim appear from Lampleigh: 301 and Bartholomew: 302; also from Cumber, Rann, Stilk, Cook, Bulkley, Mills, White, Lee, Hendrick, Cooke, Bainbridge and Thornborow. L.C. 300-333; 1 Chit. Conts. 24; 1 Add. 3; 1 Beach, 4-6, 147-215; Laws. 91-110; Smith, 14, 15, 103, 157; 39 Am. St. 735-746, n.: cases (able *resume*); 2 Kent, 464-467; Huffc. Ag. 52; Reinh. 62.

Cited, §§ 3, 36, 65, 66-87, Hughes' Conts. *Cited,* p. 26, § 329, Hughes' Proc.

One promise for another is a sufficient

Exemptions.—

Ex Nudo.—

consideration. 55 W. Va. 335, 104 Am. St. 998; 9 Cyc. 323. An offer made and accepted is a contract. Such are marriage contracts. Cook: 321.

Ex nudo pacto and *Non hæc in fœdera veni* are the leading elements of a contract. Legislatures cannot detract from these elements as they may change the element of competent parties, the legality of subject-matter and the certainty essential to establish. If one element of a cause of action can be created by statute then the entire right to an obligation may be created. *See* CAUSE OF ACTION; Scott v. McNeal.

A simple contract without a consideration will support no action, is a maxim of the civil law. Smith, Conts. 169. *See* CONTRACTS.

Ex nudo pacto: Rationale of the maxim; importance of. Smith, Conts. 169; Eastwood.

There must be a consideration to support every promise. Rann: 312; cases; Matter of James (1895), 146 N. Y. 78, 48 Am. St. 774-789, n.; Seymour v. Delancy (1824), 3 Cow. 445, 15 Am. Dec. 270, 304, ext. n.; Hamer v. Sidway (1891), 124 N. Y. 538, 12 L. R. A. 463-473, ext. n. (abstinence from intoxicants and tobacco is a good consideration). S. P. in Talbott v. Stemmons' Ex'r (1889), 89 Ky. 222, 5 L. R. A. 856, n.; Lampleigh; Smith, Lead. Cas.; Depeau, Am. Lead. Cas.; notes, 39 Am. St. 735-744 (able *resume* of cases); 102 Am. St. 303-315.

Voluntary and gratuitous promises are not enforceable, and equity will never enforce them. 6 L. R. A. 807, n. See *Leges non verbis*, etc. *Ex nudo pacto*, etc., *is from the civil law.* 2 Kent, 463; Bro. Max. 745.

Consideration is presumed in a bill or note. Carnwright v. Gray (1891), 127 N. Y. 92, 24 Am. St. 424, n., 12 L. R. A. 845; 1 Danl. Nego. Insts. 161, 162. *See* Bro. Max. 745; Moses v. Bank (1892), 149 U. S. 298; Rann: 312. *Total failure is a defense.* 2 Rand. Com. Paper, 538-555.

Deeds; sealed instruments. Jackson v. Cleveland. *See* DEEDS.

A sealed note precludes inquiry into a consideration, and even against the language of a statute permitting it. Aller (1878), 40 N. J. Law, 446; Ans. Conts. 59, n. Parties may contract to raise no question relating to the consideration. This is their right.

Views of Ex nudo pacto, etc., present the law of contract and of procedure as in closest relationship; for upon the consideration moving from one to another at his special instance and request depends whether or not the promisee is a *wronged* party. Upon his being a *wronged* party depends the "cause of action"; whether or not there is a wrong for jurisdiction to attach to. *Fabula non judicium.*

There must be a wronged party to set the wheels of justice—jurisdiction—in motion. No other person can have a standing before a court.

A promise for which one parts with no consideration is never a cause of action. This is a decisive test, and it shows the correctness of the rule in Cumber. Hazy views relating to this case are cleared from procedure standpoints. *See* p. 38, Hughes' Proc., *citing* Cumber; COMPROMISE; CAUSE OF ACTION.

EX PACTO ILLICITO NON ORITUR actio: From an illicit contract no action arises. Bro. Max.; *Ex turpi causa*, etc.; *In pari*, etc.; *Ex maleficio.* § 18, Hughes' Conts.

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EXPERT EVIDENCE: *See* Rogers on; 17 Cyc. 25-274; Gillett's Ind. Ev. 207-223; *Cuilibet in sua arte*, etc.; Hammond. Qualification of medical. 7 Am. Crim. Rep. 364. Admissibility, weight and effect. Hammond; Davis v. U. S. (1897), 165 U. S. 373 (41 L. ed. 750-754, n.); 1 Bouv. Dic. 738, 739; Nelson v. McClelan (1903), 31 Wash. 208, 60 L. R. A. 793 (cannot be discriminated against); And. Dic.; McClain, C. L. To prove insanity. Burt v. S. (1897), 38 Tex. Crim. Rep. 397, 39 L. R. A. 305-340, n.: cases; 1 Wh. Ev. 451.

Witnesses to a will to prove. *Re* Miller (1897), 179 Pa. 645; 39 L. R. A. 220-230, n.

Conclusiveness of testimony of experts. Hall v. St. Louis (1897), 138 Mo. 618, 42 L. R. A. 753.

Opinion, testimony. 1 Whart. Ev. 15, 509, 434-456, 515; 1 Whart. C. L. 821-827; Whart. Crim. Ev. 403-426; *Note*, 66 Am. Dec. 228-246; 1 Gr. Ev. 440; 3 Wigm. Ev. 1917-2027 (opinion rule); 7 Am. & Eng. Encyc. Law, 490-516; 8 Encyc. Pl. & Prac. 744-782; Rogers, Expert Testimony; Davis.

Value; how proved. 1 Gr. Ev. 440; 1 Whart. Ev. 450; 2 Tay. Ev. 1272. The measure and elements of value. 1 Sedgk. Dam. 242-265; 3 *id.* 1287, 1310. Offers of third persons to prove, inadmissible. Hine v. Manhattan R. R. (1892), 132 N. Y. 477, 15 L. R. A. 591, n.

Price paid for an article is evidence on the question of market value. Smith v. Griffith (1842), 3 Hill, 333; 38 Am. Dec. 639, n., 643.

Expert must answer either to a state of facts stated, agreed to or assumed to be true hypothetically, or evidence delivered in the hearing of the witness. Dickinson v. Fitchburg (1859), 13 Gray (Mass.), 546; Bro. Max. 934.

May prove meaning of words. Mallan; 1 Gr. Ev. 280; 2 Whart. Ev. 939, 961, 972.

Books of science are inadmissible to prove the opinions of the author. Pinney v. Cahill (1883), 48 Mich. 584; 22 Am. Law Reg. (N. S.) 104-117, ext. n., reviewing cases; 1 Gr. Ev. 440; Collier v. Simpson (1831), 5 C. & P. 373 (24 E. C. L. R.); C. v. Wilson (1854), 1 Gray, 338.

Exceptions: They are admissible to show a witness has misquoted them. Pinney v. Cahill; Ripon v. Bittel (1872), 30 Wis. 614; 2 Wh. Ev. 666; 89 Ill. 516; Huffman, 77 N. C. 55. *See* Stiffling v. Town of Thorpe (1882), 54 Wis. 528, 41 Am. Rep. 60-63, n.

EXPLOSIONS: 19 Cyc. 1-19; Fletcher.

EX POST FACTO: Calder v. Bull; Bronson v. Kinzie: L.C. 237-238; Suth. Stat. 649-659. *See* RETROACTIVE LAWS. Bouv. Dic.; §§ 140, 163, 294, Gr. & Rud.

When interdicted to the states by the XIV Amendment, Constitution of the United States. Mallett v. N. C. (1901), 181 U. S. 589: *Stating* Calder and Kring v. Missouri.

Pleadings are a protection against. *Notes*, Lampleigh: 301. *See* Howard v. Fleming. Crime must be defined. 12 Cyc. 139-147.

EXPOSURE: Of the person. 2 Bish. Cr. Proc. 351-395; Bouv. Dic.; McClain, C. L.

EXPRESSIO EORUM QUAE TACITE insunt nihil operatur: The expression of

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those things which are tacitly implied operates nothing. Bro. Max. 670-672; 19 Cyc. 23; M'Culloch v. Maryland (Marshall's Bank Case): 147: cases; S. v. Townley: 225*a*; L.C. 214-252; Dimes: 176; Dash: 237*a*; Bradbury: 35; Kern v. Huidekoper; Reinh. Ag. 830.

Cited, pp. 20, 34, §§ 5*a*, 6, 10-12, Hughes' Proc., *q. v.* See *Lex non exacte.*

Max. No. 17, §§ 203-209, Hughes' Proc., where is found the largest resume of this important maxim. *See* L.C. 214-252, Gr. & Rud.

Cited, §§ 78-146, Hughes' Conts.

Cited, §§ 34, 33, 48, 52, 53, 79, 86-88, 108, 110, 116, 135, 138, 150, 151, 156, 187, 206, 207, 221, 227, 263, 268, 293, 297, Gr. & Rud.

It applies to constitutions. Oakley: 222.

It applies to statutes. Suth. Stat. 341; Bouv. Dic. (Statute).

Lex non exacte definit, sed arbitrio is allied to *Expressio eorum.* These and their cognates are the rules upon which the liberal constructionists and the constructive jurists and statesmen proceed. The principle expressed in these maxims applies to all subjects, and especially the conserving principles of procedure (§§ 83-123, Gr. & Rud.) and all that relates to the mandatory record.

It is a cardinal principle in law not to express in a constitution, statute, contract or other document what is implied. 199 U. S. 12, 437. Constitutions deal only in general language. This is interpreted by the prescriptive constitution, or the maxims of liberal construction, expanding here and contracting there as the nature of the subject-matter requires. *Concordare leges legibus est optimus interpretandi modus; Lex non exacte.*

Constitutions deal in general language; they cannot incorporate codes. M'Culloch: 147, *e. g.*, prosecution by information means all that law that defines and regulates the information. Davis v. Burke (1900), 179 U. S. 399; Hurtado: 220; C. v. Hess: 215. *See* GOVERNMENT.

A judgment includes the record upon which it depends. Clem: 2*c*.

Assigning a judgment does not carry right to sue on bond of officer relating to duties concerning the judgment. C. v. Wampler, 104 Va. 337, 1 L. R. A. (N. S.) 149*n* (remedial statutes strictly construed); *Assignatus.*

The means of the federal constitution are chiefly implications. These are a necessity and are liberally applied for the development and existence of the federal government. Exactly as the maxims, precedents and customs constitute the unwritten constitution of England, so they do in America; there is no difference. Church v. U. S. To illustrate, it is observed, that for carrying forward the judicial power tremendous additions are made by implication; wherever the law is defective, the federal system is made complete and

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fully operative by construction. *Regula pro lege si deficit lex.* The judgments of federal courts are carried out exclusively by federal means. These are supplied by construction; these cannot be affected by the states. They cannot impair or abrogate federal agencies. The federal government has inherent and independent authority. This doctrine was asserted by Marshall in the bank case, *M'Culloch v. Maryland.* This case, which has always met the opposition of the strict constructionists, stands for an unwritten constitution in America. This exists where the language of constitutions and statutes is enlarged or contracted by the maxims, precedents and customs of the common law. This should be well understood. S. v. Townley: cases; Kern: cases.

Statutes annex themselves to contracts. Freund (1905), 218 Ill. 283, 109 Am. St. 283, 288; Havens v. Ins. Co., 123 Mo. 417, 45 Am. St. 570, 26 L. R. A. 107, 199 U. S. 12, 437.

Vendor's lien, when implied. See VENDOR'S LIEN.

Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest: To whom jurisdiction is given, to him those things also are held to be granted without which the jurisdiction cannot be exercised. Dig. 2, 1; 1 Woodson Lect., Introd. lxxi; 1 Kent, 339.

Frustra est potentia quæ nunquam venit in actum: The power which never comes to be exercised is vain. 2 Coke, 51. Delay of justice is a denial of it. A jurisdiction that cannot decide and enforce is vain and useless; it is an absurdity. Va. v. W. Va. (1907), 206 U. S. 290.

Power to hear and decide gives power to summon and compel attendance of witnesses. The grant of jurisdiction confers great inherent powers. *See* DUE ADMINISTRATION OF JUSTICE. *Cujus juris et principæ*, etc.; *Citatio est de jure naturali*: Russell (Colo.); *Cui licet*, etc.; *Cuicunque*, etc.; S. v. Townley: 225*a*. *See* CONTEMPT. Also the power to punish for contempts. *See* Farnham; CONTEMPTS.

Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit: Whenever anything is granted, that also is granted without which the thing itself could not exist. Incidents annex themselves.

Cuicunque aliquis quid concedit concedere videtur et id, sine quo res ispa esse non potuit: Whoever grants a thing is supposed tacitly to grant that without which the grant itself would be of no effect. Bro. Max. 478-491; Suth. Stat. 500-514 (implications and incidents); Thurston; Story v. R. R.; Pinnington; Nashville Trust Co. v. Smythe; Shelley's Case; Roe v. Tranmarr; Angle; M'Culloch; Martin v. Hunter; Cohens; Von Hoffman; Edwards; Bates v. Bulkley; Piper v. Pearson. See *Expressio eorum.* § 204, Hughes' Proc.

Where the end is conceded, the means of reaching are granted. M'Culloch; *Ex-*

pressio eorum, etc.; S. v. Townley: 225*a*.

Fundamental principles of justice will be interpreted into statutes. Dimes; Oakley. *See* FUNDAMENTAL PRINCIPLES; Dash; O'Connell; Suth. Stat. 369, 421. *E. g.* notice must be given regardless of statutes. Chase v. Hathaway, 14 Mass. 222; O'Connor v. Mullen, 11 Ill. 57; Nixon: 127. See *Lex non exacte.*

Retrospective laws are excluded. Such atrocious and tyrannous laws will be rejected by implication. Dash; Bronson: 238.

Incidents annex themselves by implication. M'Culloch; Kern; Pinnington (ways of necessity). *See* EASEMENTS; Elwes.

The demands of Audi alteram partem have interpretations made in their behalf. Windsor: 1; *De minimis non curat lex.* Also the division of state power. And *Res adjudicata.* Bates. An execution not mentioned may issue upon a judgment. Roberts, 71 Tex. 11; Rood, Garn. 78.

The mandatory record is a constitutional implication. See MANDATORY RECORD; 1 Freem. Judg. 35, 37, 76.

Common law annexes itself. S. v. Moore: 222*a*; C. v. Hess: 215; Suth. Stat. 340.

Government proceeds upon the idea contained in this maxim; the assent of all is presumed. Power of courts to provide a court room. Dahnke v. P., 168 Ill. 102, 39 L. R. A. 197, n.; L.C. 225*a*.

Inherent power of courts. See *id.;* CONTEMPTS; ELISORS. *Material allegations not denied are admitted.* Dickson: 34; Hopper. *See* ADMISSIONS.

Things implied need not be mentioned. M'Culloch; Martin; Bates; Dimes.

Where the end is conceded the means of arriving at it are granted. Cole's Widow, 7 Martin (N. S.) (La.) 41, 18 Am. Dec. 241; Chicago v. Stratton (1896), 162 Ill. 494, 53 Am. St. 325; Suth. Stat. 341; *Cuicunque aliquis quid.*

Assured persons dying from criminal operation, like abortion, they consenting thereto, or from a criminal execution, cannot recover. Nullus commodum, etc.; Burt v. Union, etc. Ins. Co. (1902), 187 U. S. 362.

Dormitories and dance halls are exempt from taxation as an incident of institutions of learning. Harvard College, 175 Mass. 145, 48 L. R. A. 547.

A statute making it criminal to mark a ballot implies it shall not be counted. Parker v. Hughes (1902), 64 Kan. 216, 91 Am. St. 216. (This is liberal construction.) **Evans v. Johnson.**

Res gestæ facts and their admissibility is allied to the idea in Expressio eorum. 1 Gr. Ev. 108; *P. v. Vernon* (1868), 35 Cal. 49, 95 Am. Dec. 49-96, ext. n.; *R. v. Ld. George Gordon* (1781), 21 How. St. Tri. 486, 533, 539, 11 Rul. Cas. 292-294, n.; *cited*, 1 Gr. Ev.; Thompson v. Trevanion (1694), Skinner, 404; 11 Rul. Cas. 281-303, ext. n.; 1 Bish. Crim. Proc. 1083-1086; St. Clair v. U. S. (1893), 154 U. S. 134-155; Northern R. R., 158 U. S. 271; R. v. Bedingfield (1879), 14 Cox C. C. 341; Thayer, Cas. Ev. 650; 11 Rul. Cas. 298, ext. n.; 14 Am. Law Rev. 817; 15 *id.* 1, 71; 1 Wh. Ev. 259; 4 Mews' E. C. L. 1525, 1534; Gillett's Ind. Ev.; McClain, C. L. 411-415; Cobbey, Replev. 983-987.

EXPRESSIO UNIUS EST EXCLUSIO alterius: The express mention of one thing implies the exclusion of another. Bro. Max. 651-668; Suth. Stat. 454-459. *See* Index, *id.*; 19 Cyc. 23-29; *Ita lex scripta est;* 2 Whart. Conts. 674; Marbury: 142; Dennett: 145; Flournoy: 146. Those things enumerated exclude all others. Dartmouth College Case; Suth. Stat.; Ricketson: 59; Crepps: 113; Galpin: 63; Piper: 114; Stetson: 163; Lawrence: 132; Richards v. Com. Clay Co.; American Steamship Co.; Iverslie: 46; Garland: 60; Garland: 297; Bloom: 266; Rushton: 5; Windsor: 1; Moore v. C.: 21; Wheatley: 19; Bristow: 135; Woollam: 53; Pym: 52; Wain: 335; Goss: 55; Cutter: 308; Barnard: 108; Zaleski: 306; Rees v. Berrington: 334*b*; Rossiter; Batty; Sturdivant: 410; And. Dic.; *Verba generalia restringuntur;* Gage v. Tirrell (1864), 91 Mass. 305.

Max. No. 16, §§ 186-202. *Cited*, pp. 6, 8, 12, 14, 17, 18, 30, 31; §§ 5, 5*a*, 6, 8, 13, 16, 19, 20, 29, 31, 32, 48, 49, 62, 66, 74, 78, 79, 104, 116, 122, 142, 171, 177, 180, 181, 186, 186*a*, 188, 189, 195-206, 214*a*, 216, 220, 222, 225, 227, 233, 234, 243, 245, 254, 260, 268, 270, 275, 284, 302, Hughes' Proc.

Cited, §§ 11, 26, 40, 53, 60, 77, 96, 99*a*, 108, 114, 124, 125, 136, 144, 150, 159, 164, 182, 199, 205, 206, 239, 246, 263, 267-270, 272, 274, 287, 297, Gr. & Rud.

Applies to constitutions and statutes. U. S. v. Ellis (statute); Dewey v. U. S. (*casus omissus*); P. *ex rel.* Mooney v. Hutchinson (1898), 172 Ill. 486, 40 L. R. A. 770, Suth. Stat. 325. *See* PREAMBLES; TITLES TO STATUTES; P. v. Maynard: 143; Mech. Pub. Off. 514; 115 Ill. 165, 3 N. E. 448, 23 Wis. 126, 107 Am. St. 1034; Blake v. McClung (strict rule applied to Fourteenth Amendment; effect must be given to each word); Walker: 118 (justices' description of subject-matter); White: 130; Butterfield, 187 Ill. 598, 79 Am. St. 246, n. (deed); Deputron: 121 (statutory requirements of a sheriff's deed). *Ita lex.* An express way is exclusive; no other way can be implied. Lane v. Dorman; Galpin: 63 (service of process on infants).

State legislatures cannot impair contracts but federal government can, also courts. 3 Page, Conts. 742; Barron: 241; Hanford: 86.

A jurisdiction vested by a constitution cannot be changed by a statute. Suth. Stat. 570; Marbury: 142.

Statutes allowing appeals are strictly construed. Suth. Stat. 567.

This maxim applies in taxation. Enumeration of things for which tax can be laid excludes all others. S. v. Davidson, 114 Wis. 578, 581.

It applies to construction of the record. See MANDATORY RECORD; Iverslie: 46: cases. Also extradition proceedings. Johnson, 205 U. S. 354; Crain; Planing Mill: 2*d*; *Verba fortius.*

Jurisdiction of one thing is not of another. Walker: 118; Huntsman: 231; Cruikshank: 232.

Objections—exceptions—to all waivable matter must be apt, prompt, specific and certain. It is absurd to apply the rationale of the rule in one relation and reject it in another. It equally applies in dilatory procedure, motions, special demurrers, to objections, to evidence, instructions, motions for new trials and assignments of error. *Dolus.*

Whatever can be waived is waived unless aptly, promptly and specifically ob-

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jected to. There is no more important rule in judicial procedure. None is more worthy of establishment, respect and vindication. It is a necessary rule for the due administration of the laws. *See* Atlantic; Duvall v. Ellis; Miller: 290*b*: cases; Shutte: 291.

The principle may be perceived from the requirement to assign errors. Upon this depend the use and purposes of the statutory record. It is surplusage without an assignment of errors; it is only available to the extent that errors are correctly assigned; only to that extent will the statutory record be opened or looked at. It is otherwise with the mandatory record. Windsor: 1; Campbell v. Porter: 2. § 53 (Convenience), Gr. & Rud.

Statutory limitations of suability cannot defeat a jurisdiction given by the constitution. Blake v. McClung.

This maxim is a dominant rule of construction. §§ 186-202, Hughes' Proc.; Suth. Stat. 454.

Order of court allowing brief to be filed in vacation must be strictly complied with. Eason v. Mayor, etc. (1898), 106 Ga. 179.

Strict construction. Recitals in the record of a trial that the accused appeared in person and by attorney, and that the jury were ordered "to try the issue joined," are insufficient to show that he pleaded to the indictment or was formally arraigned. Crain; Munday: 79: cases; Cooper v. Reynolds (liberal construction).

Its idea comprehends certainty and all that flows from it. Bristow; Rushton; Moore v. C.; Wheatley; J'Anson: 91; McLaughlin: 31; Kewaunee: 29. *Constitutions are waste paper without it.* Galpin: 63; Marbury; Dewey; Blake.

What is expressed in a record excludes all others. Kempe: 115.

Another form of expression is: Expressum facit cessare tacitum: The express controls the unmentioned. An unequivocal statement prevails over an implication. 123 Wis. 296, 107 Am. St. 1034; 115 Ill. 165; Gaddis, 91 Ill. 124; And. Dic. 436; 2 Herm. Estop. 575; Line v. Stephenson (1838), 4 Bing. (N. C.) 678-684; 5 Bing. (N. C.) 183-186 (13 E. C. L. R.), (35 E. C. L. R.), 14 Rul. Cas. 710, n. (covenants for quiet enjoyment in a lease, if express, exclude implied ones); 8 Mews' E. C. L. 1138; Bro. Max. 653; Hare v. Horton (1833), 5 Barn. & Adol. 715-730 (27 E. C. L. R.), 14 Rul. Cas. 699. And another is: *Designatio unius est exclusio alterius et expressum facit cessare tacitum:* Line; Dewey; Deputron: 171.

Rule ably stated: Marks Co. v. Watson (1902), 168 Mo. 133, 90 Am. St. 440, 56 L. R. A. 957; P. *ex rel.* Wood v. Draper (1857), 15 N. Y. 544; C. v. Clark (1844), 7 Watts. & S. 127; Page v. Allen (1868), 58 Pa. 338, 98 Am. Dec. 272; Cool. Const. Lim. 36.

Evidence is limited to the purpose for which it is offered. Roff v. Duane (1865), 27 Cal. 565; Henry v. Everts (1866), 29 Cal. 610. But see Sill v. Reese (1874), 47 Cal. 294.

Assignments of error must not be too general. "That the court erred in entering judgment for the defendant," is too general. Klotz v. James (1895), 96 Iowa, 1, 59 Am. St. 348, n.; Deitsch v. Wiggins; L.C. 296; Duvall v. Ellis; Brewer

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Co. *See* ASSIGNMENTS OF ERROR; Miller: 290*b*.

Title to statute. Bobel: 250; *Nigrum*, etc.

Statute giving permission to except to instructions given after the trial does not include those refused. Gutzman v. Clancy (1902), 114 Wis. 589, 58 L. R. A. 744.

This maxim applies to contracts. Cutter: 308; U. S. v. Cramp (1907), 206 U. S. 118; Mueller; Elakely v. Sousa (1900), 197 Pa. 305; Paradine. A surety is bound by the contract signed. Conditions between the principal and surety uncommunicated to the promisee or creditor are no defense in an action by him. Joyce v. Auten (1900), 179 U. S. 591; *Non hæc in fœdera veni;* Rees: 334*a*; Miller v. Stewart, *sub* Abel: 334; 3 Suth. Dam. 725; Kemble: 391.

One offering a reward for arrest and conviction is not liable for the arrest only. Williams v. West Chicago R. R. (1901), 191 Ill. 610, 61 N. E. 456, 85 Am. St. 278; Cutter: 308; Shuey v. U. S.; 323.

A contract for one kind of coffee is not satisfied by another of equal worth. Crossman v. Lurman (1904), 192 U. S. 139. The sale of a ticket to a wife is not to the husband. Aiken v. Southern R. R. (1903), 118 Ga. 118, 62 L. R. A. 666; Partridge v. Ins. Co.

An express warranty excludes an implied one. Northern Co. v. Wangard (1903), 117 Wis. 624, 98 Am. St. 963; Hogins. *See* ORAL EVIDENCE.

Power to adjourn legislature for one cause excludes all others. Taylor v. Beckham (1900), 21 Ky. L. Rep. 1735, 49 L. R. A. 258.

Denials. *See* Dickson: 34; Mutual Ins. Co. v. Dingley; Eyre v. Shaftsbury (Guardian and ward). *See* INFANTS.

Verifications. Statutes regulating are strictly construed. Warman, 185 Ill. 60 (strict case).

Mandatory statutes proceed upon this maxim. Suth. Stat. 454. *See* INDEX *id.*; STATUTES; CONSTITUTIONAL LAW.

This maxim is one of good faith and morals. Bona fides exigit, etc. It involves the rationale of certainty, and the matters therewith mentioned. From many aspects it lies at the base of a constitutionalism. It stands for certainty, consistency and stability. See *De minimis non curat lex.* It is interwoven with the grounds of law. §§ 46-72, Gr. & Rud.

An objection that a statute is opposed to a state constitution is a waiver of its invalidity under the federal constitution. Osborne v. Clarke, 204 U. S. 565.

EXTORTION: American Steamship Co. 19 Cyc. 35-49. *See* COSTS; Bouv.; And. Dic.; COMPOUNDING OFFENSES; S. v. Oden (1894), 10 Ind. Ap. 136, 9 Am. Cr. R. 295 (must allege fees were demanded for official act). Nature and elements; criminal prosecution. 10 Cyc. 35-49.

Intent no element. Am. Steamship Co. v. Young.

Money obtained by, may be recovered. 2 Whart. Ev. 737, 738. By incumbent under unconstitutional statute. 9 Am. Crim. Rep. 297.

EXTRADITION: See Castioni, In re; 19 Cyc. 50-100; Bouv., And. Dic. Among the states is a political duty. Ky. v. Dennison (1860), 34 How. 66, 2 Tucker, Const. 374. *See* 12 Am. Rep. 303-453: cases; Farrel, 78 Conn. 150, 112 Am. St. 98-144, ext. n.

The record must present the crime laid with certainty. Pleadings must be certain, and governors must look to and be guided by the record. *See* Pettibone.

EXTREMIS PROBATIS PRAESUMUNTur media: Extremes being proved, intermediate things are presumed. *Res ipsa loquitur: Ex uno disces omnes: Probatis*, etc. 1 Gr. Ev. 20.

Presumptions from the commission of one crime to prove another. P. v. Molineux; Strong v. S. See *Res inter alios;* SYSTEM.

EX TURPI CAUSA NON ORITUR actio: No cause of action arises from illegality. Holman, Bro. Max. 730, 732, 739. See *Ex maleficio; Crimen omnia*, etc.; *In pari delicto*, etc.; *Ex pacto illicito; Pacta*, etc.; Smith, Conts. 207.

Cited, §§ 92, 133-136, Hughes' Conts.

EX TURPI CONTRACTU NON ORITUR actio: No action arises on an immoral contract. Dig. 2, 14, 27, 4; 2 Kent, 466 ("and no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity"). And such was the civil law. Code, 6, 3, 6; 1 Sto. Conts. 592. *In no age could one stipulate for iniquity.* 2 Kent, 467; Collins; Merryweather. *See* COMPOUNDING OFFENSES; *In pari*, etc.

EX UNO DISCES OMNES: From one thing you can discern all. *Probatis*, etc.; *Res ipsa loquitur. Cited*, §§ 23, 29, Hughes' Proc. Montgomery v. S.

EYRE v. SHAFTSBURY (custody and control of infants). *See* INFANTS.

FABULA NON JUDICIUM: Fiction will not confer jurisdiction. 2 Best, Ev. 595; *Leges non verbis*, etc.; *Facta sunt potentiora verbis:* Facts are more powerful than words. *Res ipsa loquitur.* § 147, Hughes' Proc.

Jurisdiction depends on facts, not words. Ex facto jus oritur; De non apparentibus, etc.; *Fabula. See* FACTS. Wonderly: 102; *note* Cutter: 308; Lampleigh: 301; Ferguson: 264; Cohens: 244. *See* DICTUM. *Cited*, p. 38; §§ 5, 13, 15, 21, 22, 75, 79, 122, 124, 147, 150, 152, 349, 353, Hughes' Proc.; §§ 169, 226, 253, Gr. & Rud.

Jurisdiction attaches to things, to facts, not to words. False and sham pleadings are the basis for contempt proceedings and are not foundations for the investiture of lawful jurisdiction.

S. v. Baughman: 268; Wonderly: 102; Campbell: 2; Graver: 103; Cutter; California: 270; Bro. Max. 329, n., 342, 971; Weltmer v. Bishop: 268*a;* 1 Freem. Judg. § 118; Brown, Jurisdic. 1; Banner, In re (judgment and compromise open to inquiry after merits above and beyond *bona fides*). Smith, Conts. 186. Shams and myths will not attract jurisdiction. Wall, *sub Debile fundamentum fallit opus;* Horan: 85. *Nor are false judicial recitals.* Needham; Brown, Jurisdic. 3.

Supreme laws of the land provide that federal courts alone can have jurisdiction of ambassadors, consuls and matters affecting their interests. In what way can these be bound to entertain jurisdiction, except when there are such personages, and also a real controversy affecting them, in other words, a subject-matter, and beyond these a juridical statement in writing, describing such wronged persons and the wrong to be remedied?

Jurisdiction is only attracted by realities. Judicial myths, shams and mockeries cannot be acted upon or

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considered by constitutional courts. If such defects appear from the mandatory record, it is subject to collateral attack. To resist this, there must be reality of person, of wronged person, of wrong and wrongdoer, and all of these must appear with certainty. *De non apparentibus*, etc. The general law enables these courts to consider the interests of ambassadors, and the statement of the ambassador confers jurisdiction in the particular or individual case. But a sham or pretended or false ambassador cannot confer jurisdiction upon those courts. Graver: 103.

Accordingly appears the necessity of right construction and that this must proceed agreeably to *In præsentia majoris*, etc. It must proceed for the ends and purposes assigned and declared in preambles and bills of rights; these declare the purposes for which courts are created, and courts cannot transcend those purposes. *See* PROCEDURE.

Bro. Max. 329, n., 342, 971; *Verba intentione debent inservire; Ad ea quæ frequentius; Leges non verbis; Ex dolo malo non oritur actio;* Needham: 261. *See* White: 317.

One is presumed dead after an absence of seven years and unheard of. Nepean (death). Upon this an administration of his estate may proceed, but titles devolving thereon may be defeated should the presumed decedent return and reclaim his property. Springer: 24. Judgments, decrees, and orders of court depend upon the existence of actual, or real facts. Springer: 24; Horan: 85. *De non apparentibus.*

The constitutionality of a law can only be raised by one in interest. Johnson, 139 Cal. 532, 96 Am. St. 161.

Effect of award upon claim arising out of illegal transaction. Singleton, 114 Ga. 548, 58 L. R. A. 181, n.; Ellis v. Newbrough, *sub* Horn v. Cole, §§ 5-5*b*, Hughes' Proc. Or of a compromise. *See* COMPROMISE; CAUSE OF ACTION.

One who has no trade secret in an action relating to trade-marks is not a wronged party. Hopkins, Unfair Trade, 158; Seabury: 281. And analogously so it is as to copyrights. Weltmer: 268*a.*

A wronged party is an indispensable element of due process of law. Taylor: 219*a.*

Proceedings lacking the elements of due process of law are coram non judice. Fabula.

The cause of action is a jurisdictional inquiry that cannot be foreclosed. See COMPROMISE.

A cause of action must exist to merge into a judgment and to sustain it. Parsons, 83 Ky. 305. *See* COMPROMISE CASES; Callisher Case.

For the cause of action—the wronged party—one may inquire far and deep. §§ 68-73, Hughes' Conts. Parties cannot contract the facts constituting a wrong for reasons of public policy, involving the

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genius of government, its creation and maintenance of courts, and the rationale of their jurisdiction and how it may be administered.

Courts will not decide moot cases. Tennessee v. Condon (1903), 189 U. S. 64. Jurisdiction cannot attach to them.

The mere deliction of a defendant is not a cause of action until the wronged party appears. About this hangs the tremendous discussion in contract of one person contracting with another for the benefit of a third. Hendrick: 319. Another part of this discussion hangs around views that arise from explaining *Ex nudo pacto.* *See* CONTRACTS. From the bare, naked promise, no cause of action arises. One must part with a consideration before he is wronged. Upon this is tested the soundness of the rule in *Cumber v. Wane* (one cannot pay all of an overdue liquidated debt by paying a part).

One must be a wronged person, really and in substance, before he can show a cause of action.

If a defendant can prove the tradesman is a bankrupt, the doctor a quack, the lawyer a knave and the divine a heretic, this will destroy their respective claims for damages. Where there is no reality of injury there is no remedy. 3 Bl. Com. 125. *Damnum absque injuria.* In the above is an important rule of damages. § 67, Gr. & Rud.

The law looks to substance, not to form is a paraphrase of a maxim of equity. § 41, Gr. & Rud. There must be a thing *in esse* before there can be a sale; there must be something to convey or a deed is inoperative; there must be a marriage before a court can act upon it; before a court can award its custody there must be a child. Likewise there must be the *cause of action,* it must be described and it must exist. For it there must be allegations and there must be facts. *Fabula.*

FACTORS: George v. Clagett, 19 Cyc. 109-307.

FACTS, NOT CONCLUSIONS, MUST BE pleaded. Cruikshank; Hanford: 86; 1 Bish. Cr. Proc. 329, 331, 514, 515, 519 (4n); L.C. 90. *See* CONCLUSIONS; ALLEGATIONS; *Dolus versatur in generalibus.*

Facts are essential to describe a cause; and about this certainty is demanded. "Glittering generalities" encourage sham and fictitious pleadings, and these involve words only. See *Fabula.* Where certainty and morals are involved courts demand protection of these and appellate courts demand certainty to enable them to review. L.C. 223, 224.

Facts may be inferred from other facts alleged. Farnam: 97. *Res ipsa loquitur;* Dobson; § 23, Hughes' Proc.

Notice requires facts; descriptive allegations. *See* FRAUD; CONCLUSIONS OF LAW; DESCRIPTION. *Negligence; facts showing must be pleaded.* King: 205; Holland v. Bartch.

Facts support presumptions. From facts presumptions issue and flow that deeply affect pleadings and proofs. See *Res ipsa; Probatis extremis;* JUDICIAL NOTICE.

Facts cannot lie. 18 How. St. Tr. 1187; 17 *id.* 1430; but *see* Best, Ev. 587. *See* CONCLUSIONS OF LAW; *Dolus; Res ipsa.*

FACTUM A JUDICE QUOD AD EJUS officium non spectat, non ratum est: An act of a judge which does not pertain to his office is of no force. 10 Coke, 70; Dig. 50, 17, 170; Marshalsea Case; Lange: 159. *See* DICTUM; USURPATION; COLLATERAL ATTACK; DIVISION OF STATE POWER.

FAILURE OF PROOF. Bristow v. Wright. *See* VARIANCE; NON-SUIT.

FAIR v. STEVENOT (1866), 29 Cal. 486, 11 Mor. Min. Rep. 11, 3 Wash. R. P. 317, Wade, Notice, Jones, Mort., Pom. Eq., Dev. Deeds.

Possession as notice of an occupant's rights. *See* Williamson v. Brown; *Res ipsa;* Le Neve: 396.

FALSA DEMONSTRATIONE LEGATUM non perimi: A legacy is not destroyed by an incorrect description. Bro. Max; Oliver v. Henderson, *sub* AMBIGUITIES; Fay's Estate (Will case); *Noscitur;* 2 Wharf. Conts. 668; *Falsa demonstratio;* § 13, Hughes' Proc.

FALSA DEMONSTRATIO NON NOCET: Mere false description does not make an instrument inoperative. Bro. Max. 629-646; Thomas v. *Id.;* Heaton; Bloom; And. Dic.; Morton; 1 Smedes & Marsh. (Miss.) 494, 40 Am. Dec. 107-111; 1 Gr. Ev. 301. See *Ambiguitas,* etc.; DEMONSTRATION; Bouv. Dic.; 4 Wigm. Ev. 2476-2478; 19 Cyc. 313; *Præsentia corporis,* etc.; *Nil facit error,* etc.; *Veritas demonstrationis tollit errorem;* NAMES. *Cited,* §§ 189, 261, 262, 263, 264, 266, 267, 273, 274, 288, 322, Hughes' Proc.

Cited, §§ 54, 164, Gr. & Rud.

A statute was intended to amend Sec. 296, *and specified Sec.* 293, *instead; but by reference to the context the mistake was apparent, and passed as Falsa, etc. P. v. King,* 28 Cal. 265; Sedgk. Stat. 226: cases; End. Stat. 219.

Misdescribing a shop book is inconsequential, *i. e.,* day-book for a ledger, or *e converso.* 105 Am. St. 171. Equity looks at substance, not form. *Ut res magis,* etc.

Metes and bounds control course and distance. Heaton; Prentice v. R. R. (1894), 154 U. S. 163.

A call for a wrong county when the record is in the right county, when the description is otherwise certain, is sufficient. Metcalf v. Prescott (1891), 10 Mont. 283, 15 Mor. Min. Rep. 137 (*Falsa,* etc., cited and applied).

If a pleading by paragraphs sets out various notes of different dates and amounts, and one of these was referred to by date and amount, but erroneously as to paragraphs, the former controls. *Verba generalia;* End. Stat. 219.

False demonstration in a judicial record may be corrected by a court, without notice, and as a matter of course, *e. g.,* an execution may be amended to conform to a judgment. Dewey v. Peeler, 161 Mass. 135, 42 Am. St. 399.

Corporate name; corporate grantor. It is sufficient if the true name of a corporation grantor can be gathered from an instrument and by extrinsic evidence. Chapin v. School District (1857), 35 N. H. 445; 69 Ill. 658; 1 Beach. Corp. 374, n.; 1 Dill. 180-182; Wiebold, 35 Wis. 556; *De minimis.*

A false description need not vitiate provided the person or thing has once been sufficiently described. Sargent; AMBIGUITY; Stockton, 112 Cal. 236, 53 Am. St. 210 (whole must be considered).

Misnomer of a crime, or failing to name it in caption, does not affect an instrument.

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S. v. Howard (1896), 66 Minn. 309, 34 L. R. A. 178. *Verba generalia*, etc.

FALSA GRAMMATICA NON VITIAT chartam: Bad grammar does not make void a deed. Bro. Max. 686, n. *Falsa orthographia, sive falsa grammatica, non vitiat concessionem:* False spelling or false grammar does not vitiate a grant.

FALSE IMPRISONMENT: Piper: 114; Clarke; Munn; West v. Smallwood; Bigl. Lead. Cas. Torts; Whaley v. Lawton (1901), 62 S. C. 91, 56 L. R. A. 649, *stating* West v. Smallwood (void proceedings); 9 Mews' E. C. L. 702-711; Oates v. Bullock (1902), 136 Ala. 537, 96 Am. St. 38 (void warrant no defense for an arrest). *See* ARREST; Allen v. Wright: 167; Bouv. Dic.; 2 Bish. Cr. Proc. 365-368; 19 Cyc. 316-378.

Coram judice proceedings necessary for a defence. 77 Vt. 61, 107 Am. St. 745, n.

FALSE PERSONATION: 19 Cyc. 379-383.

FALSE PLEADING: False pleading is actionable. *See* Wonderly; SHAM PLEADING; Graver; P. v. McCumber; *notes* Lampleigh; Cutter; R. v. Esop. § 42, Hughes' Proc.

Judgment may be entered on. Lowry v. Moore; Garland v. Davis. *See* ABATEMENT.

Reality of wrong must exist. Fabula non judicium; Weltmer.

Mischiefs of. §§ 5*a*, 6, Hughes' Proc.; Cutter.

Mischiefs of, upheld. And. Steph. Pl., pp. 438-440. § 155, Hughes' Proc.

If verified, is perjury. Note, 70 Am. Dec. 637; Graver; Bell v. Brown; McClain, C. L. 859.

FALSE PRETENSES: 1 McClain, C. L. 657-665; R. v. Gardner; P. v. Richards; P. v. Gilman, *sub* CONSPIRACY; 80 Am. St. 490, n. (cheating by seances); R. v. Wheatley; P. v. Johnson; R. v. Solomon; R. v. Barnard; R. v. Hazelton; R. v. Martin; R. v. Bryan; 4 Mews' E. C. L. 1211-1251; 9 Am. Crim. Rep. 283 (what are indictable). *See* Bouv. Dic.; 19 Cyc. 384-448.

FALSE RETURN: Hauswirth: 51. To writ of *mandamus*, 5 Mews' E. C. L. 151. By sheriff, 12 Mews' E. C. L. 1152. Bouv. Dic.

FALSUS IN UNO, FALSUS IN OMNIbus: False in one thing, false in all. Rapalje, Law Dic. 510, 10 Crim. Law Mag. 167; Stoffer v. S. (1864), 15 O. St. 47, 86 Am. Dec. 470. *Overruled*, Meade v. McGraw (1869), 19 O. St. 55, 62. *See* Note, 86 Am. Dec. 330. *See* also *Allegans contraria*, etc.; McClain, C. L. 864; 2 Wigm. Ev. 1008-1015; 19 Cyc. 449; 17 *id.* 781.

Cited, §§ 5, 5*b*; Max. No. 40: § 354; §§ 17, 114, 119, 128, 181, 184, 186*a*, Hughes' Proc.

Cited, §§ 52, 271, 272, Gr. & Rud.

This only applies where a witness speaks as to a fact with reference to which he cannot be presumed liable to mistake. The Santissima Trinidad, 7 Wheat. 338, 339; C. & A. R. R. v. Kelly, 210 Ill. 449. *Nemo allegans suam turpitudinem est audiendus.* This maxim is not a fixed rule of law (but *see* Stoffer v. S.); the jury are free to apply or reject it. 1 Gr. Ev. 461, n. But one in contradiction must have the weight of his testimony impaired and scanned with suspicion. 159 U. S. 293.

The contradiction must relate to material matter. Dacey, 116 Ill. 555, 575, 6 Am. Cr. R. 461, 477.

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Impeachment of witness. Allen: 203 (able *resume*); 1 Gr. Ev. 461-469; 1 Wh. 549-571; 1 Wh. C. L. 814-816; 3 *id.* 3009, n. *c*; 2 Wigm. Ev. 889-918.

Witnesses may be impeached: First. By disproving facts. 1 Gr. Ev. 461; 73 Am. Dec. 762.

Second. By general reputation for veracity. 1 Gr. Ev. 461; 73 Am. Dec. 772; 82 Am. St. 25-68: cases.

What questions may be asked. *English-American rules.* 1 Gr. Ev. 461. Questions must relate to veracity; a female witness's chastity cannot be attacked. 23 R. I. 72, 91 Am. St. 614, n. *Contra*, cases.

After the usual foundation laid, witness may be asked if he would believe the party under oath. 1 Wh. Ev. 565, Cas.; Hamilton v. P., 29 Mich. 185; Thayer, Cas. Ev. 1210; 73 Am. Dec. 771; P. v. Mather; n. 36 Am. St. 801; *Contra:* Benesch v. Waggner, 12 Colo. 534, 12 Am. St. 254.

A departure from the English rule was made, owing to an erroneous conclusion reached by Professor Greenleaf. 1 Wh. Ev. 565, n.; 73 Am. Dec. 772, 773, *citing* Phillips v. Kingfield (1841), 19 Me. 375, 36 Am. Dec. 760; Thayer, Cas. Ev. 1211.

Personal confidence or distrust in witness may be inquired after if foundation is laid. R. v. Brown, n.; P. v. Mather, 21 Am. Dec. 122; Hamilton v. P., *supra;* Thayer, Cas. Ev. 1210; Blue v. Kirby (1824), 1 T. B. Mon. (Ky.) 195, 15 Am. Dec. 95-100, n. *Practice in different states.* Chase note to Steph. Dig. Ev. Art. 133.

Third. Proof of contrary statements. 1 Gr. Ev. 443, 462; 1 Wh. 552, 554; 73 Am. Dec. 762-777; 15 *id.* 99.

Time, place and circumstances must be mentioned to witness. 1 Gr. Ev. 462; Mattox, 156 U. S. 237. Reasonable certainty is sufficient. 73 Am. Dec. 764, n., 15 Am. Dec. 100. See *Consensus;* 140 Ind. 476, 49 Am. St. 209, n., 33 L. R. A. 781, 82 Am. St. 40; 137 U. S. 507; Nutter, 6 Colo. 260. *Contra:* Rose, 18 Colo. 59, 31 Pac. Rep. 493.

Statements out of court consistent with witnesses' evidence cannot be shown. Conrad, 11 How. 480. *See* 3 Am. Cr. R. 50.

Witness may be asked if he has been arrested for felony to test his credibility, but not simply to disgrace him. S. v. Bacon (1886), 13 Oreg. 143, 8 Crim. Law Mag. 81, 57 Am. Rep. 8; 11 Rul. Cas. 144-158, n.

Collateral matters, however irrelevant, if criminal and degrading, may be inquired after, if they do not expose witness to punishment. Carroll v. S. (1893), 32 Tex. Crim. Rep. 431, 40 Am. St. Rep. 786-791, n.; 32 N. Y. 127, 88 Am. Dec. 311-324, n. *Nemo tenetur*, etc.

Party vouches for his witness. Allegans contraria, etc. One cannot directly impeach his own witness. 1 Gr. Ev. 442; 1 Wh. Ev. 549; Tourtellotte, 4 Colo. Ct. App. 377, 384. One cannot introduce a witness as credible and at the same time discredit him.

One who appeals to the conscience of another for an answer in equity is presumed to get a veracious reply. 1 Gr. Ev. 351. Therefore the rule in equity is that a verified answer will outweigh one witness. *Sub* L.C. 185.

Whether one may contradict his own witness, is in conflict. 15 Am. Dec. 96, 97. By leave of court it may be done. Hickory, 151 U. S. 303; 159 U. S. 408; Best,

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Ev. 645; Whart. Ev. 549; Melhuish v. Collier (1850), 15 Q. B. 878 (69 E. C. L. R.), 6 Mews' E. C. L. 969; Selover v. Bryant (1893), 54 Minn. 434, 40 Am. St. Rep. 349-353, n., 21 L. R. A. 418; 15 Am. Dec. 96, 97; 21 Am. St. 418-434, ext. n.; 82 *id.* 57-63.

Statutes often change this rule. Adams v. Wheeler (1867), 97 Mass. 67; Greenough v. Eccles (1859), 5 C. B. (N. S.) 786; Rice v. Howard (1886), L. R. 16 Q. B. Div. 681, 6 Mews' E. C. L. 968; Selover, *supra* (general rule); Hurley v. S. (1889), 46 Ohio, 320, 4 L. R. A. 161-171, ext. n.

Interest, bias, affections and antipathies of a witness may be shown. N. 36 Am. St. 801; 15 Am. Dec. 100; 1 Gr. Ev. 450; Lodge, 122 Ala. 97, 82 Am. St. 23-68, ext. n.

Attempt to tamper with justice; witnesses or jurors may be shown to raise a presumption against a party. McHugh, 189 Pa. 197, 41 L. R. A. 805.

Inconsistent pleadings. *See* Dickson: 34.

Verba fortius; Dolus versatur. See *Res inter alios acta; Res ipsa loquitur:* SYSTEM; P. v. Molineux; Strong v. S.; *Ex uno omnes disces;* CONTINUITY.

But a fact first brought out on cross-examination may be contradicted. Hall v. Manson (1896), 99 Iowa 698, 34 L. R. A. 207: cases.

Party may contradict his own witness by attacking specific statements, but not by direct impeachment or his general reputation. 1 Gr. Ev. 442, 443, 462; 15 Am. Dec. 96-99; Omaha, 13 Colo. 41, 16 Am. St. 185, n., 5 L. R. A. 236.

Rebuttal evidence to sustain the credibility of a witness. 82 Am. St. 63-68.

Previous inconsistent statements of witnesses may be shown. 1 Gr. Ev. 444; 2 Tay. 1282; Proff. Jur. Tri. 231. Notes L. C. P. (U. S.) Rep. 475; 82 Am. St. 39-52.

Collateral statements in answer to cross interrogatories cannot be contradicted. 1 Gr. Ev. 423, 448, 449, 458. These are conclusive on party calling them out. Tourtellotte, *supra;* 82 Am. St. 50-52; Loving v. C. (1878), 80 Ky. 507-511; Kennedy v. C. (1879), 77 Ky. 340-360; Champ v. C. (1859), 59 Ky. 24, 74 Am. Dec. 389-400, ext. n.; Seavey v. Dearborn (1849), 19 N. H. 355; Combs, 39 N. H. 17, 18; P. v. Greenwall, 108 N. Y. 296, 2 Am. St. 415 (answer of collateral question conclusive); Stokes v. P., 53 N. Y. 164, 13 Am. Rep. 492-507; 92 N. Y. 653; Ellicott v. Pearl, 9 L. ed. 475, n.; Harris v. Tippett (1811), 2 Camp. 637-639, 3 R. R. 767, 11 Rul. Cas. 144, n.; R. v. Watson (1817), 2 Stark. 149-159, (3 E. C. L. R.), 11 Rul. Cas. 145, n., 4 Mews' E. C. L. 1602,

Lewdness may be shown to impeach. S. v. Sibley (1895), 132 Mo. 103, 53 Am. St. 477, n.

Rape; character of prosecutrix; for general indecency may be inquired after. *See* GENERAL REPUTATION; 52 Am. St. 482.

False and sham pleadings. P. v. McCumber: 110; Bell v. Brown; Graver: 103.

One denying an allegation can take no advantage of such admission in a pleading. Abbott's Brief, Pl., § 559; Spores v. Boggs (1876), 6 Oreg. 122; Bell v. Brown. *See* ADMISSIONS.

After a hearing an answer is never amendable in equity. *Sub* Owen v. Weston; Walden; Shields, 17 How. 144; Given v. Wheeler (1881), 5 Colo. 598; Dow v. Jewell (1846), 18 N. H. 340, 15 Am. Dec.

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371-381, n. *Same rule applies to a bill.* *See* AMENDMENTS; *Salus populi,* etc.

FARMERS' & MERCHANTS' BK. v. BK. of Rutherford (1905), 115 Tenn. 64, 88 S. W. 939, 112 Am. St. 817-821, n.: cases.
Payment of forged check drawn to a payee or bearer, by the drawee, cannot be recovered. A bank must know the signatures of its customers. *See* Tobey: cases.

FARNAM v. BROOKS: L. C. 97.

FARNAM v. COLEMAN (1905), 19 S. Dak. 342, 117 Am. St. 944-962, ext. n.

Contempt; inferior tribunals have no common law or implied power to punish; they have no inherent power to punish. See *Expressio eorum,* etc.; CONTEMPT.

FARNI v. TESSON (1861), 1 Black (U. S.) 309 (codes deprecated by Justice Grier). Green v. Palmer. *Cited,* p. 5, Hughes' Proc.

FARWELL v. BOSTON, ETC. R. R. (1842), 4 Met. 49, 38 Am. Dec. 339, n., Redf. L. C. Rys. 384, Bigl. L. C. Torts, 688; 2 Thomp. Neg., 924-1056, ext. n., 3 Macqueen, H. L. Cas. 316; Pattee, Torts, 566; 46 L. R. A. 364, Mech. Ag., Sto., Huffc., Reinh., Tiff.; 2 Gr. Ev. 232*b*, Whart. Neg., Shear. & R., Thomp. Neg., Pars. Conts., Chit., Cool. Torts, Bish. (cases cited from all states); Ala. R. R., 97 Ala. 126, 38 Am. St. 163, 18 L. R. A. 433; Ewald, 70 Wis. 420, 5 Am. St. 178, n. *See* Baltimore R. R. v. Baugh, 149 U. S. 368-411 (history of question—many cases); Dresser on Employer's Liability. *Cited,* § 303, *Gr. & Rud.*

Farwell case stated: F., an engineer, while operating his engine, ran it off the track through an open switch, left so by W., a switchman employed by the railroad. He was a careful and trustworthy man, and long served the defendant as a switchman and often rode with F. upon his train. *Held,* they were fellow-servants, and that plaintiff could not recover.
Rule 14, Moak, Underh. Torts, p. 45: cases; Missouri Fellow-Servant Cases: Dixon R. R., 100 Mo. 413, 18 L. R. A. 792-801: cases; Hunn R. R., 78 Mich. 513, 7 L. R. A. 500, ext. n.
A fundamental rule of right and of duty is discussed in the Farwell Case that is very instructive from many viewpoints and especially from contracts.
See also Davies; R. v. Clarence; R. v. Conde; R. v. Morby; R. v. Smith; U. S. v. Holmes—all cited in the Preface to Hughes on Conts. (entirety of the law).

Engineer and fireman traveling on engine alone are fellow-servants. Balt. etc. R. R. v. Baugh (1892), 149 U. S. 368-411: cases, 37 L. ed. 772-789, n.: cases; 8 Am. R. R. & Corp. Rep. 182-221, n.; Boyd, 58 Ark. 66, 8 Am. R. R. & Corp. Rep. 222-238, ext. n.; Jones, 125 Mo. 666, 26 L. R. A. 718, n. (porter of sleeping-car is not, with trainmen); Little Rock, 58 Ark. 198, 25 L. R. A. 386-399, ext. n.; Mast v. Kern (1898), 34 Or. 247, 75 Am. St. 580-640, ext. n.: cases (great *resume* of leading cases).
A common laborer under a section boss, working on the line while injured by a passenger train, is a fellow-servant of its engineer and conductor. Northern R. R., 154 U. S. 349-361, 38 L. ed. 1009, n.
Master is not liable for personal injuries sustained by servant in master's service if the injury was inflicted either:
First, from the servant's own fault, as when he failed to look for approaching trains

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before stepping upon a railroad track. Elliott v. R. R., 150 U. S. 245: cases; *Volenti*, etc.

This defense is contributory negligence. Stokes; Davies.

Second, by a fellow-servant, *i. e.*, one engaged by the master in the same department of service, upon the same job. About this are immense discussions; these are generally led to from *Farwell v. Railroad, supra.*

Negligence; fellow-servants; liability of employer for injury done by one servant to another. Respondeat superior: Hilliard; Laning; Mellors; Priestly; *Qui per alium facit*, etc.; note, 27 L. ed. (U. S.) 605.

Fellow-servants; who are. Hough, 100 U. S. 213, 25 L. ed. 612, n.; Wabash, 107 U. S. 454, 27 L. ed. 605, n.; Louisville, 67 Miss. 255, 2 R. R. & Corp. Rep. 169, n.; Miller, 20 Or. 285; 4 Am. R. R. & Corp. Rep. 1-19, n.; Chicago, 53 Ill. 336: *stated*, Whart. Neg. 233; Jenkins, 39 S. C. 507, 39 Am. St. 750, n.: cases; Flannegan, 40 W. Va. 436, 52 Am. St. 806, n.; Jackson, 43 W. Va. 380, 46 L. R. A. 337-359, ext. n.

Conductor and brakeman are. 175 U. S. 323; Speer, 198 Pa. 112, 82 Am. St. 792.

Priestly v. Fowler stated: F., a butcher, hired P., a servant, whose duty it was to take meat around in a van to customers, and while engaged in this, the van broke down, and P. was injured. *Held*, he could not recover.

"The servant is not bound to risk his safety in the service of his master, and may, if he sees fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability, and the extent of it, as the master."

Priestly (1837), 3 M. & W.; 2 Thomp. Neg. 819-1056, ext. n.; 135 N. Y. 1, 31 Am. St. 801, 90 Va. 496, 44 Am. St. 930, 2 Gr. Ev. 232*a*, Mech. Ag., Cool., Bish., Add. Torts, Pars., Chit., Bish., Add. Conts., Huffc. Ag.; Reinh.; Tiff.; Bigl. L. C. Torts, Bro. Max. 786, 853, 858, Shear. & R. Neg., Thomp. Neg., Busw. Pers. Inj. 230; 9 Mews' E. C. L. 889; Labett, Mas. & Serv.; Mellors; *Volenti non fit injuria:* Roberts v. Smith; McManus; Hodges v. Kimball, 104 Fed. 745.

Seamen and captain of a vessel are fellow-servants, and for beating a seaman, the owners of the vessel are not liable. Gabrielson, 135 N. Y. 1, 31 Am. St. 793-809, ext. n.

Master not generally responsible to servant for hurt sustained in service. Farwell; Hilliard; B. & O. R. R. v. Baugh; Patton, 169 U. S. 758 (burden of proof on servant). *Ei incumbit*, etc.

Defective cars and appliances kept in use. 218 Ill. 130, 1 L. R. A. (N. S.) 670, n.

Respondeat superior. *See* Craker; Hay; Hilliard; McManus.

Independent contractor. *See* Hilliard; Hay.

The duty of a master with respect to the employment of his servants: what constitutes an incompetent servant. Smith v. St. Louis R. R., 151 Mo. 397, 48 L. R. A. 368, 393, ext. n.

Constitutionality of statutes making corporations liable for negligent acts of fellow servants. Callahan, 170 Mo. 473, 60 L. R. A. 249, n.

Who is vice principal. Mast v. Kern, 34 Or. 247, 75 Am. St. 580-640, ext. n., *supra:* Labatt, Mas. & Serv.

Vice principals are determined with reference to the character of the act which caused the injury. Lafayette, 47 C. C. A. 367, 108 Fed. 335, 54 L. R. A. 33-51, ext. n. (able *resume* of all states).

Vice principals considered with reference to the superior rank of a negligent servant. Stevens, 40 C. C. A. 421, 100 Fed. 378, 51 L. R. A. 513-531, ext. n.

What servants are deemed to be in the same common employment, apart from statutes when no questions as to vice principalship arise. Sofield, 64 N. J. 605, 50 L. R. A. 417-468, ext. n.

Conductor: when a co-servant. Jackson, 43 W. Va. 380, 46 L. R. A. 337-359, ext. n.

FAVORABILIORES REI POTIUS quam actores habentur: Defendants are rather to be favored than plaintiffs. See *Actore;* BURDEN OF PROOF; Dovaston; McArthur.

Cited, §§ 157, 224, *Gr. & Rud.*

Estoppels are odious and are equitably construed. Deliction is not presumed. De non apparentibus; Actore; Dig. 50, 17, 125. *See* 8 Wheat. 195, 196; Bro. Max. 639, 715, 8th ed.; DEFENDANTS; MANDATORY RECORD.

This rule is identical with Rushton v. Aspinall, and it equally applies to a defendant when he is the actor. Reus excipiendo. This maxim is the limit of liberal construction. See Bro. Max. 601, 715; also pp. 180, 182, 347, 349, *id.*

Every presumption against a pleader. Dovaston; *Ambiguum placitum.*

FAYERWEATHER v. RITCH (1904). *See Res adjudicata. Cited*, § 199, Gr. & Rud.

FAYS' ESTATE (1904), 145 Calif. 82, 78 Pac. 340, 104 Am. St. 17-34, ext. n.

Cited, §§ 139, 151, Gr. & Rud.

Holographic wills are from the Code Napoleon. They are upheld if possible, as they were under the civil law. A will dated in 1859 provided for certain persons born years later. *Certum est quod certum reddi potest.* While a date is required, still the command for the true date is directory. Other documents and facts show the true date was probably 1889. Looking from the ensemble it could not have been 1859. *Noscitur a sociis.* If it were it would be void, which we can not declare if it can be validated. *Ut res magis valeat quam pereat.*

FEDERAL COURTS: 11 Cyc. 843-1020.

They will apply general law in some cases. James v. Gray, 131 Fed. 401, 1 L. R. A. (N. S.) 321-332, ext. n.

Diverse citizenship; real party in interest. Practice relating to. Kirven; REMOVAL OF CAUSES. *See* Hughes' Proc.

FEDERAL GOVERNMENT: Polity of. Ableman; M'Culloch; Logan; Martin v. Hunter's Lessee; Tarble's Case; Cohens; Slaughter House Cases; Blake v. McClung. *See* UNITED STATES: 2 Bouv. Dic.; DUE PROCESS OF LAW; CONSTITUTIONAL LAW.

FEDERALIST: Advocates a judiciary for all its high and necessitous purposes. §§ 33, 110 Gr. & Rud. *Maxims commended in.* § 80 Gr. & Rud.

FEDERAL LAWS: Administration of in state courts. Loughlin v. McCaulley (1898), 186 Pa. 517, 48 L. R. A. 33, n. *See* SUPREME LAW OF THE LAND; 162 U. S. 565, 586.

Supremacy of. Blake; Cohens; Martin; Tarble's; Gibbons. *See* SUPREME LAW OF THE LAND; *In præsentia majoris.*

FEDERAL POWER: Developed on maxims. §§ 21, 22, 23, 33 Gr. & Rud.

FEDERAL PROCEDURE. Conforms to that of the state, in law cases. § 914, R. S. U. S. See Shepard v. Adams (1897), 168 U. S. 618; O'Connell: 224.

In equity the high court of chancery governs. Supreme court rule, 3; Equity rule, 90; Circuit Court of Appeals rule, 8; §§ 1-3 Beach Eq. Pr.; 7 Encyc. Pl. & Pr. 812-816; Martin; Cohens. *See* UNITED STATES COURTS (2 Bouv. Dic.); Foster, Fed. Prac.; 11 Cyc. 843-1020.

After removal the cause must be repleaded if necessary to conform to federal procedure. Hill v. R. R., 104 Fed. 754.

Court of claims not bound by special rules of pleading. 197 U. S. 146. *See* EXAMINING MAGISTRATES.

FEDERAL QUESTION: What is. Apex Co., 32 Or. 582, 62 L. R. A. 413-543, ext. n. (instructive illustrations). *Upon what it depends.* Michigan, 185 U. S. 112.

Jurisdiction of United States Supreme Court to review judgments from state courts. Kipley v. Illinois (1897), 170 U. S. 182, 42 L. ed. 998: cases; note Freeman: 287. *See* UNITED STATES COURTS (2 Bouv. Dic.); Howard v. Fleming.

Must be raised in state court. Winona Case; Scudder v. Comptroller of N. Y. (1899), 175 U. S. 32: cases; Erie R. R. v. Purdy (1901), 185 U. S. (how raised); Howard v. Fleming; McKay, 204 U. S. 458. When raised. Osborn, 204 U. S. 565 (*Res ipsa loquitur*).

Mandatory record must present. Furman v. Nichols; Covington, etc. Co. v. Sanford; Winona Case; Howard v. Fleming.

Every presumption against the pleader is applied. Kipley Case, *supra;* Craswell.

Is waived if not aptly set up and relied upon. Yazoo Co. v. Adams (1900), 180 U. S. 1, 8; Turner v. Richardson, *id.* 87; Davis v. Burke (1900), 179 U. S. 399 (*habeas corpus* from state court); Eastern Building Ass'n v. Welling (1901), 181 U. S. 47.

The one raised and assigned, Expressio unius strictly applies to. Chapin, 179 U. S. 127.

Petition for rehearing too late. 197 U. S. 343.

Question how raised. 187 U. S. 155, 63 L. R. A. 329-334; 201 U. S. 319 (cannot be in assignment of errors); 188 U. S. 291, 63 L. R. A. 33-58, ext. n.; 199 U. S. 274; 188 U. S. 314, 63 L. R. A. 471-480 (what the record must show); Hulbert v. Chicago; Felts v. Murphy; Taylor v. Beckham; Ky. v. Powers.

Estoppel; application of is not a federal question. 198 U. S. 416 (rights under federal laws may be waived); Winona. § 151, Gr. & Rud.

Contempt proceedings and consequent condemnations and confiscations are not. Patterson v. Colorado. They are local law. 205 U. S. 454.

Discretion to protect or to refuse. Urquhardt, 205 U. S. 179. *See* Royall.

Title to property is a question of local law. Tracy, 205 U. S. 170 (title to, seems viewed as a minor question in government. *See* CONSTRUCTIVE NOTICE).

Mandatory record vindicated. Windsor: 1; Perez: 2e.

General demurrer grounds may be

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waived it seems. Great N. R. R. v. S. (1908), 208 U. S. 452, also a reply. *See* REPLY.

Consensus tolit errorem is liberally applied. *See* Felts.

FELLOW SERVANT. Farwell Case.

FELTHOUSE v. BINDLEY: L. C. 325.

FELTS v. MURPHY (1906), 201 U. S. 123, 26 S. C. 366-368.

Felts stated: F., an old soldier, indigent, quite deaf and infirm, was convicted by an Illinois court of murder. He sought an acquittal from this, by applying to a federal circuit court by *habeas corpus,* upon the ground he was deprived of "due process of law," for the reason the evidence was not repeated to him through his audiphone. He had also asked the state supreme court to relieve him. Finally he applied to the federal Supreme Court, which informed him that no federal question was shown under the 14th Amendment; that mere irregularity or formal error did not involve due process of law. The court in substance held, that where there is jurisdiction of the person and subject-matter, then the mere formal error is not a federal question; that unless the proceedings were subject to collateral attack they would pass for "due process of law."

Consensus tollit errorem (acquiescence in [mere formal] error obviates its effect) was also discussed. 204 U. S. 647; Shutte: 291; Washington R. R. v. Bradley, 10 Wall. 303.

The court discussed other matters, but possibly these were *ex gratia,* for they arose from matters that do not belong to the mandatory record. F. was present, but could not hear; had he been absent that would not have altered the case. Howard v. Ky.

Habeas corpus cannot perform the functions of appeal or writ of error.

FENCE: Bouv. Dic.; 2 Mews' E. C. L. 1857; 19 Cyc. 466-489.

FENT v. TOLEDO, PEORIA & WARSAW R. R. (1891), 59 Ill. 349, 14 Am. Rep. 13-24, 1 Thomp. Neg. 136-172, n.; *q. v.;* 1 Redf. R. R. Cas. 350, 17 L. R. A. 56, 27 Fla. 1, Whart. Neg. 153, Cool. Torts, Smith, Cas., 36 Am. St. 824, 2 Kinkead, Torts, 704-711. § 347, Hughes' Proc.

Negligence, fire, remoteness. Fire was set by sparks from a locomotive to a warehouse, and from this to Fent's building, two hundred feet away. The question of proximate and remote cause was held one for the jury. Fent; Vaughan; Henderson v. R. R., 114 Pa. 461, 27 Am. St. 652, n., 16 L. R. A. 299; Campbell, 121 Mo. 340, 42 Am. St. 530, 25 L. R. A. 161, n. (statute may make railroad liable for escape of fire); Matthews, 121 Mo. 298, 25 L. R. A. 161, 24 S. W. 591, 9 Am. R. R. & Corp. Rep. 441-472, n., *id.;* Cincinnati, 94 Ky. 71; 8 Am. R. R. & Corp. Rep. 160-174, n.; Lake Erie, 7 Ind. App. 145, 52 Am. St. 442.

The rationale of setting out fire and allowing it to escape is the same as that of water. Fletcher v. Rylands; or noxious fumes. St. Helen's; or of keeping ferocious animals. May; or labeling a poisonous drug as harmless. Thomas v. Win-

Fent v. T. P. & W. Ry.—
chester; or of setting a dangerous thing in motion. "Squib Case."
One negligently constructing a hay rick on the extremity of his land, if in consequence of its spontaneous ignition his neighbor's house is burned down, is liable. Vaughan v. Menlove (1836), 3 Bing. N. C. 468, 32 E. C. L. R.; Bro. Max. 383: cases. *See* CAUSATION; REMOTENESS; *In jure non remota.*
Fires; liability for setting out. McNally v. Colwell (1892), 91 Mich. 527, 30 Am. St. 494-507, ext. n.; Brown v. Brooks (1893), 85 Wis. 290, 21 L. R. A. 255-263, n.; Anderson v. Miller (1896), 96 Tenn. 35, 31 L. R. A. 604 (owner may recover both value of his property and also insurance); Fires, 9 Encyc. Pl. & Pr. 1-9; Bro. Max. 383.
FERGUSON v. CRAWFORD: L.C. 264.
FERGUSON v. KINNOUL: AUCHTERARDER Case (1843), 9 C. & F. 251, 311, 8 Eng. Reprint, 412; *stated* Bro. Max. 90. *See* Lange: 159.
FERRIES: Establishment, regulation and protection of ferries. Sistersville Ferry, 52 W. Va. 356, 59 L. R. A. 513-556, ext. n.
FERTILIZING CO. v. HYDE PARK (1878), 97 U. S. 659; Myer, Vested Rights, 577, 2 Thayer, Const. Cas. 1762, Dill. Munic. Corp., Beach., Busw. Pers. Inj.
Nuisance; abatement; suppression of, on writ of error. *Held,* that the village of Hyde Park, under express authority to "define or abate nuisances which are or may be injurious to the public health," with other and large powers, could prohibit the manufacturing company from moving its offal and refuse through the streets of the village, under penalties for violation of the ordinance. 2 Beach, Pub. Corp. 1020-1032. Coming to a nuisance. St. Helen's Smelt.
Nuisance; Sic utere, etc.; *obligation of.* Moak, Underh. Torts, 236, 240-242; 1 Dill. Munic. Corp. 141. *See* NUISANCE.
FIELD v. HOLLAND: L. C. 387.
FIELD v. MAYOR OF NEW YORK: L.C. 84.
FIGHTING BY CONSENT: S. v. Beck; *Volenti;* Hegarty v. Shine: cases.
FIGURES. Are sufficient in a pleading. *See* Berrian v. S., *sub* ABBREVIATIONS.
FILES: Plaintiff is interested in, and should conserve. McArthur: 99. *See* DEFENDANTS; MANDATORY RECORD; *Favorabiliores.* Filing of papers; what is. Beebe v. Morrell (1889), 77 Mich. 114, 15 Am. St. 288-298, ext. n.; Hoyt v. Stark (1901), 134 Cal. 178, 86 Am. St. 246.
FILLEY v. DUNCAN (1867), 1 Neb. 134, 93 Am. Dec. 337-358, ext. n. *Cited,* §§ 326, 331, Hughes' Proc.
Judgment liens; estates and interests affected by. Buchan v. Sumner (1847), 2 Barb. Chan. 165; 47 Am. Dec. 305-320, n.; Waller v. Best (1885), 3 How. (U. S.) 111 (11 L. ed. 518, n.).
Cannot be extended by the courts. Technical Case. McAffee v. Reynolds (1891), 130 Ind. 33, 18 L. R. A. 211.
Continuing lien of judgment opened or set aside to permit a defense. Farmer's, etc. Co. v. Killinger (1896), 46 Neb. 677; 41 L. R. A. 222, ext. n.
Upon after-acquired property. Moore v. Jordan (1895), 117 N. C. 86, 42 L. R. A. 209, n.
Of judgment in United States courts. Sel-

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ler's Lessee v. Corwin (1832), 5 Ohio, 398, 24 Am. Dec. 301-314, n.; Ward v. Chamberlin (1862), 2 Black (U. S.) 438: cases; 17 L. R. A. 319.
Homesteads; judgment liens against. Vanstory v. Thornton (1893), 112 N. C. 196, 34 Am. St. 483-506, ext. n.
Attachment liens. Franklin Bank v. Bachelder.
FINCH v. BROOK (OR BROCK) (1834) 1 Bing. N. C. 253, 41 L. J. (N. S.) C. P. 1 (27 E. C. L. R.), 1 Scott, 70, 6 Rul. Cas. 589-815, 41 R. R. 575, Shir. Lead. Cas. 235; 2 Benj. Sales, 1064; Hunt on Tender; 14 Mews' E. C. L. 18 (Tender).
Tender; what is; what it admits. 1 Gr. Ev. 205; Moynahan v. Moore (1860), 9 Mich. 9, 77 Am. Dec. 468-491; McCalley v. Otey (1892), 99 Ala. 584, 42 Am. St. 87, n.; 9 Encyc. Pl. & Pr. 729, 735, 1 Beach, Conts. 300, 320. It admits the contract and debt to that amount. Supply Ditch Co. v. Elliott; Bliss, Code Pl. 364. § 320, Hughes' Proc.
It must be unconditional. Moore v. Norman (1892), 43 Minn. 428, 38 Am. St. 526, 18 L. R. A. 359, n. *See* § 332 (what is sufficient). Hughes' Proc.
FINDING LOST GOODS: Title to lost goods; duty of finder to owner; his right to compensation; actions by owner or finder. 19 Cyc. 535-564; Armory: 180.
FINDING THE LAW: Important observations. *See* INTRODUCTION; LITERATURE, Hughes' Proc.; Illustrating from *Master, Pasley,* and other cases. Case system; basic idea of, is to serve a knack of finding, pp. 44-46 Hughes' Proc. §§ 9, 44 Gr. and Rud.

Table of cases a table of great principles, when. *See* INTRODUCTION, Hughes' Proc.

Nomen est quasi rei notamen; Ignoratis terminis, ignoratur et ars; Non ex opinionibus singulorum, etc.
Is often said to be its larger part. Also, that he who can find it can learn it.

Important factors in finding the law are the maxim and the leading case on the subject under consideration. These are the foundations, or the acorns from which the subject springs. At this juncture it is well to introduce the meaning of *Melius petere fontes quam sectari rivulos* (it is better to drink at the fountains than to wander down the rivulets). See *Satius.*
How to learn the maxim and the leading case. See Hughes' Proc. pp. 44-46. Here it seems well to state that if the discussions of the action of DECEIT are desired then it is turned to in its alphabetical place where is indicated that *Caveat emptor* is the maxim, also *Pasley v. Freeman* is the leading case. Turning to *"Caveat emptor"* set therewith, is found *"Pasley";* also its cognate cases, *"Chandelor"* and *"Laidlaw"* (the

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leading American case). Under *Caveat* the leading cases are indicated. These are led to under the title, "LEADING CASES." Hereunder scores of "rivulets" are found. Now, having drunk at the "fountain," then one may wander down the "rivulets." Pursuit of those cases through tables of cases cited in well-written and completely finished works on contract and fraud will indicate what "sipping at the streams" means. See *Satius*, etc. Likewise the law of alterations, of accord and satisfaction, or consideration is found.

The foregoing plan enables one to get most from the fewest books. This plan gives one the benefit of his own library. This plan was taught when the maxim was taught and understood. "The condensed good sense of nations" has worn long and it has also worn best. Antiquity did nothing in vain.

FIRE: Negligent use of. Fent. Squib Case.

FIRE ARMS: Negligent use of; liability for. Morgan; *Sic utere tuo*, etc.

FIRST LESSONS: *See* MAGNA CHARTA; DECLARATION AM. INDEPENDENCE; Art. Confed. Const. U. S.; M'Culloch; Tarble's; Martin; Cohens; Hawaii; Cruikshank; Windsor: 1.

Bacon's Beacon Lights. §§ 1-30, Gr. & Rud.

Grounds and rudiments: Maxims. *Id.* §§ 44-71.

Consider with first eleven amendments, Const. U. S.; Barron v. Baltimore: 241, also 14th Amendment and Windsor v. McVeigh: 1. *See* DUE PROCESS OF LAW.

Is the Mandatory Record a constitutional implication? Gr. & Rud. § 83-123. *See* APPELLATE PROCEDURE; ESTOPPEL; COLLATERAL ATTACK; Scott; Coggs; Hadley; Fletcher; *Verba fortius* (*see* EVERY); *De non apparentibus; Expressio eorum; Expressio unius.*

Appellate Procedure: The Mandatory and the Statutory Records, assignment of errors, the argument and brief. A court of appellate jurisdiction only.

The record or constitutional rule; the mystic (Every presumption is against a pleader) and the *coram judice* (A court is bound by its record) rules.

The great subjects of the law are Procedure, Equity, Contract, Crime, Tort and Construction.

The three great rules of procedure are above stated to be the constitutional, the mystic and the *coram judice*. *See* CODES; CONSTRUCTION.

The great rules of Equity are *Ubi jus ibi remedium;* Equity attaching for one purpose attaches for all; He who seeks equity must do equity, or No one can take advantage of his own wrong.

The basic elements of a contract are the request, the consideration, a lawful subject matter, certainty and capability of

First Lessons.—
proof in due form, competent parties and a lawful subject-matter.

The leading elements of crime are, the maxim *Actus non facit reum nisi mens sit rea* and its jurisdiction. A crime is defined to be an act of omission or of commission in violation of a public law commanding or forbidding it.

Of torts: An act of omission or commission in violation of law commanding or forbidding it.

Construction: Its leading rules are those upon which constructionists part, which are *Expressio eorum quæ nihil insunt operatur* and *Ita lex scripta est*, which is a part of *Expressio unius est exclusio alterius.* The intention of parties almost always attends *Verba intentione debent inservire* and *Ignorantia legis neminem excusat; Juris præcepta; Regula pro lege.*

FISH: Right to. S. v. Shaw (1902), 6 Ohio, 157, 60 L. R. A. 481-525, ext. n.; 7 Mews' E. C. L. 84-118; 19 Cyc. 986-1030 (Fish and Game).

FISH v. CLELAND: L.C. 12c.

FISHBURNE v. FERGUSON (1887), 84 Va. 87. *See* Molton v. Camroux; INSANE PERSONS. *Cited*, § 57, Hughes' Conts.

FISHER v. McGIRR (1854), 1 Gray (Mass.), 1, 61 Am. Dec. 381-410; Cool. Torts, 308; 2 Kinkead, 578 (trespass by officers serving writs); 2 Gr. Ev. 597, 629. Search warrants; requisites. Semayne; Savacool: 164.

Statute may be valid in part and void in part. Fisher stated in *Eureka*, 15 Utah, 67, 62 Am. St. 204; 2 Dill. Munic. Corp. 421; 1 Beach, 518; Spraigue: 236; Blake v. McClung; Suth. Stat. 297.

Casus omissus. See *id.; Boni judicis*, etc.; James: 233; Suth. Stat. 605.

Property used for illegal purpose; right to seize and destroy. Wagner, 95 Me. 519, 93 Am. St. 412 (gambling apparatus).

FISHER v. THIRKELL (1870), 21 Mich. 1, 4 Am. Rep. 422, Bigl. L. C. Torts, 627.

Negligence; easements; excavations under public streets; who liable for. *Sub* Hill v. Boston.

FISK v. CATHCART (1891), 16 Colo. 238, 243. Records compared and considered in *res adjudicata* issues. Burton v. U. S.; Johnson, 20 Colo. 143. *See* Hume.

FITZGIBBON v. LAKE (1862), 29 Ill. 165. *Cited*, § 126, Gr. & Rud.

FITZSIMMONS v. JOSLIN: L.C. 384.

FIUNT ENIM DE HIS (CONTRACTIbus): *See* ORAL EVIDENCE; § 53 (Convenience), Gr. & Rud.; 1 Gr. Ev. 275; *Contra scriptum.* Accordingly one should have the protection of a deed if he so contracted. Cooch. One has the right to contract for what shall stand for proof in case of dispute, and this right should not be legislated nor contracted away.

FIXING BAIL: Bouv. Dic. *See* BAIL.

FIXTURES: Elwes; *Quicquid*, etc. 9 Cyc. 1033-1037.

Compensation for. Bright. Meteor falling on land a part of. Goddard. Brick of destroyed building are realty. Guernsey, 113 Ga. 898, 84 Am. St. 270, n.

General rule to determine; electric light fixtures. Canning, 22 R. I. 624, 84 Am. St. 858, n. *See 7* Mews' E. C. L. 119-153; Bouv.; And. Dic.

FLAG: Bouv. Dic. Trading under as if a sign or trademark may be prohibited. Halter v. Nebraska, 205 U. S. 34, 74 Neb. 757, 7 L. R. A. (N. S.) 1079 (desecration of). *See* POLICE POWER.

FLETCHER v. ASHBURNER: *See* EQUITABLE CONVERSION.

FLETCHER v. PECK (1810), 6 Cranch 87 (3 L. ed. 162, n.: cases); Marshall, Const. Cas. 194-217, 3 Am. Cas. R. P. 501-557, n., Huff. & Wood. Am. Cas. Conts. 696, Thayer, Const. Cas. 114, Suth. Stat. 465-472, 1 Kent, 257, 413, 2 *id.* 306, 3 *id.* 378; 3 Pars. Conts. 479, 500; Bish.; Cool. Const. Lim., Sto. Eq., Bisph. Eq., 3 Wash. R. P. 186, 191, 193, Page, Conts. 18, 1753. Angle. §§ 152, Hughes' Proc.; §§ 70, 151 Gr. & Rud.

Fletcher stated: Dunn corruptly influenced the legislature of Georgia to grant him land by statute. Then he conveyed it to Peck and other *bona fide* purchasers. (See Le Neve.) Peck afterwards sold to Fletcher, with covenants of warranty of title, and P. defended as an innocent purchaser. (See Bell.) The following resolutions arose:

1. *The unconstitutionality of an act should be declared with great caution;* the infraction should be so clear as to support a strong conviction of incompatibility. But when so, courts of every grade should so declare. Marbury, Art. VI, Const. U. S.; Bish. Stat. Crimes, 91; Lane v. Dorman.
2. *Fraud in a legislative grant will not vitiate; it is voidable, but not void; and it may be inquired into directly, but not collaterally.* See *Ex dolo.* Honorable intention of the legislature is presumed. S. v. Kelly; End. Stat. 182, Suth. Stat. 333, Blackw. Tax Tit. 712. Generally, motives cannot be inquired after. Bish. Stat. Crim. 38, Cool. Torts, 292 (2d ed.); Doyle, 94 U. S. 535; S. v. Kolsem, 130 Ind. 434, 14 L. R. A. 566; 2 Whart. Ev. 980; 1 Beach. Pub. Corp. (town council). Brown v. Cape Girardeau.
3. *Bona fide purchasers protected.* Le Neve; Lickbarrow; 1 Sto. Eq. 381, 434. They are favorites in equity. 1 Sto. Eq. 434.
4. *A state may be bound by its public agents within the scope of the agency.* He who first trusted must first suffer. Lickbarrow: 394.
5. *One legislature cannot tie the hands of another.* But vested rights cannot be disturbed. Bronson; Atty. Gen. v. R. R., 35 Wis. 563. *Stare decisis; Ita lex,* etc.
6. *States can pass no ex post facto law.* Calder; Suth. Stat. 465-473.
7. *A legislative grant is a contract.* Dartmouth. *See* VESTED RIGHTS; Terry: 240.

FLETCHER v. RYLANDS (1866), L. R. 1 Exch. 265; *affd.*, L. R. 3 H. Lds. Cases, 330; 1 Smith, Lead. Cas., 10th and 11th eds.) 810-852 (reviewing English cases); 1 Thomp. Neg. 1-111, ext. n., 2 Smith, Cas. Torts, 346, Bigel. Lead. Cas. Torts, 492-495, 1 Rul. Cas. 235, 276, n., 6 Mor. Min. Rep. 129, Gt. Opin. Gt. Judges, 521; 1 Sedgk. Dam. 33-35, 14 Mews' E. C. L. 2038. §§ 343, 348, Hughes' Proc.; § 69, Gr. & Rud.

The principle in Fletcher v. Rylands is also discussed in Mathews, 121 Mo. 298, 9 Am. R. R. & Corp. Rep. 441-458, 25 L. R. A. 161; 20 Am. Rep. 394, 395; Cool. Torts, 680, Bish. Torts, 839, 36 Am. St. 840; Shear. & Redf. Neg. This case is also reported and cited as Rylands v. Fletcher, 4 H. & C. 263, L. R. 1 Exch. 265, 2 Smith, Cas. Torts, 316, Bro. Max. 368, 372, 392, Whart. Neg., Shear. & R.; Bish. Torts; 36 Am. St. 840; Gilson; Garland v. Towne (1874), 55 N. H. 55, 20 Am. Rep. 164; 1 Thomp. Neg. 853-863, n.; 2 Cent. L. J. 442; Cool. Torts; Gould, Waters; Bish. Torts; 2 Dill. Munic. Corp. (accident concurring with unlawful act causing damage is actionable). Salisbury; Squib Case (see Sharp v. Powell); Gulf, etc., R. R. v. Oakes (1900), 94 Tex. 155, 158 (a lawful act is too remote if a trespass); Wilson v. Newberry (1871), L. R. 7 Q. B. 31, 1 Moak, Eng. Rep. 14, *stating* Fletcher (a man must keep his own filth and noxious things on his own land); 10 Mews' E. C. L. 53; 14 *id,* 1851.

Fletcher.—

The principle in Fletcher involves that in the Squib Case, and also that original primal mandate of society, *Sic utere tuo.* From the latter many liabilities are established against owners of property. One of the ablest expositions of that maxim is found in Gilson, 36 Am. St. 802-861, ext. n., reviewing many cases; Smith, L. C. (10th and 11th eds.).

Bursting boilers. Marshall, 38 N. J. L. 339, 20 Am. Rep. 394; Losee. *Directors of a corporation liable for its torts as joint trespassers.* Losee, *supra.*

Explosion of powder. *Frost,* 42 S. C. 402, 46 Am. St. 736, n., 26 L. R. A. 693; Judson v. Giant Powder Co. (1895), 107 Cal. 549, 48 Am. St. 146, n., 29 L. R. A. 718, 36 Am. St. 814; Kleebauer, 138 Cal. 497, 94 Am. St. 62, n.; Cool., Bish., Torts, Bigl. Lead. Cas. Torts; 2 Gr. Ev. 469; 19 Cyc. 1-19; Laflin, 131 Ill. 322, 19 Am. St. 34, 7 L. R. A. 262; "Nitroglycerin Case," 15 Wall. 524-539.

Electric wire on or near a building. Griffin v. United Electric Co. (1895), 164 Mass. 492, 32 L. R. A. 400, ext. n.; A'Hern v. Oregon, etc., Co. (1893), 24 Or. 276, 8 Am. R. R. & Corp. Rep. 342-352, n., 22 L. R. A. 635, n. (electricity in streets causing damage); Brown v. Edison Co. (1900), 90 Md. 400, 78 Am. St. 442.

One bringing noxious elements or things upon his premises must take care of them at his peril. In Fletcher v. Rylands, water broke from confinement in abandoned mining developments, for which defendant was liable. Many cases deny this, in the absence of negligence. Carter v. Towne, *sub* Dixon v. Bell; Smith, Lead. Cas. (10th and 11th eds.).

Fletcher v. Rylands is denied. Brown v. Collins (1873), 53 N. H. 442, 16 Am. Rep. 372, 1 Thomp. Neg. 61, Smith, Cas. Torts, 357, Burdick, Cas. Torts, 104, 13 Am. Law Reg. 364, 1 Sedgk. Dam. 33, 36 Am. St. 847, Cool. Torts, Bish. Torts.

Driving a horse in a public place is not negligence per se. Proof of some negligence is essential for a recovery. Brown; Hammack, 11 C. B. (N. S.) 588, 103 E. C. L. R.; Bigl. Lead. Cas. Torts, 570-601, n., 18 Rul. Cas. 705; Cool. Torts, Bish. Torts, Bro. Max., Shear. & Redf. Neg., Busw. Pers. Inj.; 36 Am. St. 813; 3 Mews' E. C. L. 24 (carriers—passengers and other luggage), 14 *id.* 20, 21, 46. Barnard, 135 Ind. 547, 41 Am. St. 454, n.; Klepsch, 4 Wash. 436, 31 Am. St. 956, n. (blasting rock). *See* Hay.

FLETCHER v. TREWALLA: L.C. 18.

FLIGHT: As evidence of crime. McClain, C. L. 421; 6 Am. Cr. R. 88. *See* CIRCUMSTANTIAL EVIDENCE.

FLORIDA: Observations relating to *Clem v. Meserole: 2c* indicate well settled rules in that state.

Verba fortius accipiuntur contra proferentem was most ably considered in *Atlantic Co.* (1906). However, only parties upon the record were enumerated for consider-

Florida.—
ation as to construing pleadings against the pleader. The interests of the trial court, the appellate court and of the whole public were omitted. *See* CONSERVING PRINCIPLES. Dovaston: 217 was cited and followed, but not as to the classification of certainty into three degrees. The reasons for construing a pleading against the pleader were quite well stated, but not most broadly. The faults are, that only the parties named in the record were taken into account, and the adoption of three degrees of certainty. Altogether the case is very instructive. 64 Cent. L. J. 169-174.

Errors must be assigned, also argued, or they are waived. Atlantic Co.

FLOURNOY v. JEFFERSONVILLE: L.C. 146.

FOOD: Protection; offenses relating to. 19 Cyc. 1084-1102. *See* ADULTERATION.

FORBEARANCE: When a consideration. § 122, Hughes' Conts.

FORCIBLE ENTRY AND DETAINER: McClain, C. L. 839-841. *See* EJECTMENT; Bouv. Dic.; Cunningham on (1895); 19 Cyc. 1108-1192.

Forcible entry; what is. Evill v. Conwell (1828), 2 Blackf. 133; 18 Am. Dec. 138-148, n.; Mews' E. C. L. 1650.

FORCIBLE TRESPASS: A crime. *Sub Salus populi,* etc.; Green v. Palmer: 90; S. v. Lawson (1898), 123 N. C. 740, 68 Am. St. 844; S. v. Hawkins (1899), 125 N. C. 690, 74 Am. St. 669 (indictment must aver with a strong hand). *See* ROBBERY; TRESPASS.

FORECLOSURE OF MORTGAGES: What parties are barred. Provident Loan & Trust Co. v. Marks (1898), 59 Kan. 230, 68 Am. St. 349-362, ext. n. (junior claimants are). *See* EQUITY OF REDEMPTION; White & Tudor's Lead. Eq. Cas.; 9 Mews' E. C. L. 1708-1757; Bouv. Dic.

FOREIGN CORPORATIONS: *See* CORPORATIONS.

FOREIGN JUDGMENT: *See* Lazier, *sub Res Adjudicata;* Bouv. 818-822; 8 Mews' E. C. L. 823; Haddock.

FOREIGN LAW: Must be pleaded and proved. Hancock Nat. Bank v. Ellis (1898), 172 Mass. 39, 70 Am. St. 232, n.; Van Cleaf v. Burns; Bliss, Code Pl. 183; 1 Bouv. Dic. 822-824. How case is determined when proper foreign law is not proved. Cherry, — Mass. —, 67 L. R. A. 33-61. *Proof and effect.* Knickerbocker, 185 N. Y. 54, 113 Am. St. 883-884, ext. n.

FORESTALLING: 2 Bish. Cr. Proc. 396-397; 1 Bouv. Dic.; Eddy, Combinations.

FORFEITURES: *Are odious.* Bostwick; Kemble: cases; Harper v. City; 2 Warv. Vend. 807-824; 1 Bouv. Dic. 826-828; 19 Cyc. 1355-1366.

Relief in equity from forfeiture. South Penn. Oil Co. v. Edgell (1900), 48 W. Va. 348, 37 S. E. 596, 86 Am. St. 43-64, ext. n.

Of dutiable articles in passenger's baggage. U. S. v. Pearl Necklace (1901), 49 C. C. A. 287, 111 Fed. 164, 56 L. R. A. 130-139, n.

FORGERY: *Defined.* S. v. Bradley, 116 Tenn. 711, 115 Am. St. 836; Arnold v. Cost (1831), 3 Gill & J. (Md.) 219, 22 Am. Dec. 302-321, ext. n.; P. v. Smith (1897), 112 Mich. 192, 67 Am. St. 392, n.; C. v. Foster (1873), 114 Mass. 311, 19 Am. Rep. 353; 9 Encyc. Pl. & Pr.

Forgery.—
547-609, 3 Rand. Com. Paper, 1379-1786, 2 Danl. Nego. Insts. 1344-1421; R. v. Martin (1879), L. R. 5 Q. B. 34, 14 Cox, C. C. 375; 2 Bish. C. L. 529; P. v. Bendit (1895), 111 Cal. 274, 52 Am. St. 186; 4 Mews' E. C. L. 1252-1306; 10 Am. Cr. Rep. 418, n. (what is subject of).

Forgery of records to confer jurisdiction unavailing. Ferguson; *Ex dolo malo,* etc. *Forged paper; payment with, when valid. Sub* Tobey. *Presumptions from other cases. See* SYSTEM; P. v. Molineux; Strong v. S.

By making or altering mere memorandum. S. v. Hendry (1901), 156 Ind. 392, 54 L. R. A. 794, n. *See* ALTERATIONS.

Void instrument is not. McClain, C. L., *q. v.* (this illustrates the intimate relation of crimes and contract. One should know a judgment, deed and simple contract, to judge of that question in forgery); 3 Am. Cr. R. 125. *Must be of a valid instrument.* King v. S. (1900), 14 Tex. Cr. R. 108, 96 Am. St. 792, n., 9 Am. Cr. R. 301.

Generally: Bouv.; And. Dic.; 3 Gr. Ev. 102-113; 2 Bish. Cr. Proc. 398-486: cases; Am. Crim. Rep.; 66 Am. St.; 2 McClain, C. L. 743-773; 19 Cyc. 1367-1430.

FORMER ACTION PENDING: *When it may be pleaded.* Wilson, 103 Ky. 165, 82 Am. St. 578-596; 2 Am. & Eng. Cas. Eq. 195-202; McKyring: 33. *See* ANOTHER ACTION PENDING; PENDING OF ANOTHER ACTION.

FORMER JEOPARDY: *Nemo debet bis vexari;* 3 Gr. Ev. 35-38; See *Res adjudicata;* Bouv. (*Auter,* etc.), (Jeopardy) Vol. 2, pp. 4-6; 4 Am. Cr. R. 338; 12 Cyc. 259-290; Burton v. U. S.

Pleadings essential for protection of. Cruikshank: 232; Moynahan v. P.

Discharge of jury without a verdict is former jeopardy. Kinloch's Case (1746), Foster's Crown Law, 16; Lead. Crim. Cas. (B. & H.) 440-471, ext. n.; Upchurch v. S. (1896), 36 Tex. Cr. Rep. 624; 44 L. R. A. 694, ext. n.; Thompson v. U. S., 155 U. S. 271, 9 Am. Cr. R. 209 (necessity excuses discharge of jury).

Must be pleaded and proved. § 223, Gr. & Rud.

FORMS OF THE LAW: *Ordine placitandi servato, servatur et jus:* Observing the ordinary forms of pleading serves the law itself. Bro. Max. 188. *See* ABATEMENT. *Upheld by Festus and Agrippa in defense of Paul.* See *Audi; De non apparentibus.*

Are a part of the law. S. v. Baughman; Blair v. Reading; Benton.

Pleadings should observe the known and ancient forms of expression (Bro. Max. 188) as contained in approved precedents. And. Steph. Pl. 207 (Tyler ed. 342). *See* Bayard, 1 Johns. 453-471; Reversed, 2 Johns. 560. *See* also Bliss, Code Pl. 319.

Rule VIII. Pleadings should have the formal commencement and conclusions. And. Steph. Pl., § 208 (Tyler ed. 344).

Complaints. And. Dic. (declaration); Phillips, Maxwell, Pleadings; Bliss, Code Pl. 15, 16, 144.

Answers; forms of are prescribed by codes. *See* ANSWERS. § 130, Hughes' Proc.

Captions; use of. Jordan; Bliss, Pl. 144.

Denials. Dickson: 34.

Every civilized country prescribes forms. Preface, Sto. Pl. *Plea must be in mandatory record in criminal cases.* Crain; Tiede. Pol. Power, 34c.

Technicalities are the safeguards of the law.

Forms.—

See RECORD; DIVISION OF STATE POWER; Crain; Planing; Benton.

Wills: forms of, mandatory. Bro. Max. 705.

Taxation. Welty on Assess.; Drew v. Davis.

Hard cases will arise. See *id.*

Jurisdictional facts must appear of record. Crepps; Cruikshank. *See* ALLEGATIONS.

Process must be returned. *Sub* Six Carpenters'.

Courts must respect forms. Audi, etc.

Legislatures must respect. Huntsman v. S.: 231.

Forma dat esse: Form gives being. Forms of the law are a part of the law. *Forma legalis forma essentialis:* Legal form is essential form. 10 Coke, 100. *Forma non observata, infertur adnullatio actus:* When form is not observed, a nullity of the act is inferred. 12 Coke, 7. *Forms in code pleadings.* Maxwell; Phillips; CODE PLEADING. *Federal procedure.* *See* Foster's Fed. Prac. *Indictments.* McClain, C. L.; Pagin's Federal Precedents (Civil and Criminal). *Forms of action.* Bouv. Dic. *See* CODES.

FORNICATION: C. v. Mash; Bish. Stat. Crimes, 691-739; 19 Cyc. 1434-1443; Territory, 1 Mont. 359; 4 Crim. Def. 29 (man and woman living together are presumed to be married); McClain, C. L. 1125-1129.

FORSYTH v. WELLS (1861), 41 Pa. St. 291, Sedgk. Dam. 678, 80 Am. Dec. 617-620, n., 14 Mor. Min. Rep. 493, 1 Am. Law Reg. (N. S.) 225; Suth. Dam.; Sedgk. Dam.; 176 Pa. 594, 33 L. R. A. 416.

Measure of damages for mining coal and mineral. Trespasser cannot plead the benefits of his trespass. Bull; Martin; *Nullus commodum,* etc.; Jewett.

Trover; exemplary damages sometimes allowable in. Forsyth. *Trover for ore mined.* Hartford Iron, etc., 93 Mich. 90, 32 Am. St. 488, n.

FORTHCOMING BOND: Bouv. Dic.

Defences to. 124 Ga. 549, 4 L. R. A. (N. S.) 1020.

FOUR IDENTITIES: The demands for, in *res adjudicata* require pleadings and certainty in pleadings. See *Res adjudicata.*

FOX v. MACBETH: Keech; § 101, Hughes' Conts.

FRACTIONEM DIEI NON RECIPIT lex: The law does not regard a fraction of a day. Lofft, 572. But *see* DAY; COMPUTATION OF TIME.

FRANKLIN BANK v. BACHELDER (1843), 23 Me. 60, 39 Am. Dec. 601-611, ext. n. (attachment liens; origin and general nature of). Judgment liens. *See* Filley, 19 Cyc. 1451, 1462.

Execution liens attach from test of writ; after levy—seizure—the goods are in the custody of the law. Giles v. Grover (1832), 1 H. L. Cas. 72-224, 9 Bing. 128 (23 E. C. L. R.), 2 Wood & Scott, 197, 11 Rul. Cas. 550-617. *Cited,* §§ 326, 331, Hughes' Proc.

Property is held by the competent authority which first attaches it, and according to the doctrine known as the rule in Payne v. Drew (1804), 4 East, 538; Freem. Ex. 195, 199; And. Dic. 430.

FRANKLIN LODGE v. P. (1906), 220 Ill. 355, 110 Am. St. 248, 4 L. R. A. (N. S.) 1001-1020.

Corporations are liable for contempt of court.

Jurisdiction depends on only two elements, namely, 1st, of the person, and 2d, authority to enter the judgment shown under the general law, without regard to the pleadings. *See* Fish: 12c.

FRAUD: *Ex dolo malo,* etc.; And. Dic.; Suth. Dam.; 1 Bouv. 843-847; 7 Mews' E. C. L. 157-432; Whart. Conts. 232-279; 1 Page, Conts. 55-269. *Defined:* 1 Eddy, Combinations, 63; McClain, C. L.; Sto. Conts. 620; 20 Cyc. 1-146.

Vitiates all into which it enters. See *Ex dolo.* §§ 52, 70, Gr. & Rud.

Fraus et jus nunquam cohabitant: Fraud and justice never dwell together. Wingate, Max. 680; § 52, Gr. & Rud.

Immunity from, cannot be contracted for. §§ 3, 14, 18, Hughes' Conts. Parties cannot contract in forbidden relations. § 14, Hughes' Conts. Buying on credit; when it is fraud. Fitzsimmons: 384.

Burden of proof. 1 Bigel. Fraud, 123-136. Evidence. *Id.* 137-193.

Badge of fraud. Twyne's Case; Bouv. Dic.

Vitiates a judicial sentence. Windsor: 1. See *Res adjudicata; Coram judice; Ex dolo.*

When a crime. Wheatley. *See* FALSE PRETENSES.

Fraud and deceit are discountenanced and suppressed in procedure. Dunlap; Graver. *See* SOVEREIGNTY; *Coram judice.* §§ 5*a*, 5*b*, Hughes' Proc.

Fraud is never presumed. Nemo præsumitur malus; 1 Chit. Pl. 231, 12th Am. ed.; Cool. Torts, 476; New York Life Ins. Co., 96 Va. 737, 44 L. R. A. 305, n. *De non apparentibus,* etc. Nor is deliction before it is alleged and proved. Notes to Lampleigh; §§ 17-22, Hughes' Conts.; § 218, Hughes' Proc.; 20 Cyc. 108.

Suspicions insufficient; proofs must exist, either direct or indirect. Taylor, 55 N. J. Eq. 491, 62 Am. St. 818, n., 44 L. R. A. 307.

Proof of; generally depends on circumstantial evidence. 1 Bigl. Fraud, 160-166, 44 L. R. A. 306; Horne v. Higgins.

Fraudulent concealment of facts; how pleaded. Farnam; Pearsall. *Constructive fraud.* Keech. Catching bargains. Chesterfield. *Undue influence.* Huguenin; §§ 52, 72, 123, 147-153, 160, Hughes' Proc.

Fraud a conclusion of law. Bliss, Pl. 210.

Facts pleaded must show fraud. J'Anson: 91; Bliss, Pl. 210, 339, n.; King: 205; 4 Suth. Dam. 1180; 1 Bigel. Fraud, 114-122; Pearsall, *sub* LIMITATIONS; James, 107 Ga. 446, 73 Am. St. 135, n.; *Nichols v. Stevens* (1894), 123 Mo. 96, 45 Am. St. 514; 9 Encyc. Pl. & Pr. 675-698: cases; Farnam; 20 Cyc. 96.

Fraus est odiosa et non præsumenda: Fraud is odious and not to be presumed. Croke, Car. 550. Fraud must be alleged and proved. *Actore;* § 52, Gr. & Rud.

Deceit. Pasley: 375: cases; Fitzsimmons.

He who first trusts must first suffer. Lickbarrow.

One practicing deceit is liable in damages. § 96, Hughes' Conts.; Angle.

Suppressio veri; suggestio falsi. Discussion of deceit. § 98-104, Hughes' Conts.

Must be alleged and proved. Kahn, 4 Wyo. 419, 62 Am. St. 47, n.; Kindel, 23 Colo. 385, 58 Am. St. 234; Horne, *sub* Dovaston.

A general charge that a party acted "fraudulently" or made "fraudulent representations" is not good, unless accompanied with a statement of facts to sustain it; and this whether by the plaintiff or defendant. 1 Bigel. Fraud, 115: cases; Farnam; Kindel, *supra;* J'Anson. *Fraus latet in generalibus:* Fraud lies hid in general expressions. Twyne's Case. *See*

Franklin.—

Fraud.—

CONCLUSIONS OF LAW; "GLITTERING GENERALITIES"; *Dolus versatur*, etc.

One charged with fraud is entitled to know the particulars and exactly what will be offered in evidence. 1 Bigel. Fraud, 115: cases; Sto. Pl. 251, 252, n.; J'Anson.

Denial of fraud must be as specific as the charge. 1 Bigel. Fraud, 120; Graver.

Fraud lurks in glittering generalities. In generalibus, etc.; *Dolus versatur.*

Fraud is an intentional distortion of the truth; a ground of rescission, or damages; may vitiate a contract *in toto* or only a part. Mailan; *Ut res magis*, etc. Deception may estop. Horn v. Cole. Fraud vitiates a right to recover. *Ex dolo;* Holman: 363. Good motives no excuse for deception; one must intend to mislead. Whart. Conts., § 237. *See* Thomas v. Winchester.

False representation may be estoppels. Horn v. Cole; Whart. Ev. 1088. One acting fraudulently cannot recover. *In pari*, etc. Deception must have been with intent to deceive, and be acted upon. Pasley.

Fraud need not have been lucri causa; intent is inferred; likewise falsity. Fraud is inductively proved. Reckless misstatement imposes responsibility. Whart. Conts. 24.

Injury must not be too remote. Thomas v. Winchester; Langridge. Fraud need not be the sole motive; injury must result. The losing party must believe the false statement and not have the means of testing. *See* Wheatley; CONTRIBUTORY NEGLIGENCE; *Volenti*, etc. False statement of collateral matter does not avoid. Whart. Conts. 246. Party not bound by third party's mis-statement of fraud. Squib Case. Fraud may be in conduct as well as in words. When non-disclosure of justification leaves statement untrue, this is a false representation.

Non-disclosure of facts which superior business sagacity would discover does not avoid contract. Chesterfield. Party suppressing must, to be liable, actively negative fact suppressed. Neither party is bound to correct the other's misconceptions. Nor is a party bound by his silence when he is not bound to speak.

Fiduciary must disclose his relation. Proposer of business bound to give fair statement; also promoters of companies.

Assured persons must truly state all material facts. Carter. *See* CAVEAT EMPTOR. And likewise parties to family negotiations.

False promises not a false statement. Intention not to pay may be false pretense. False opinion not a false pretense, and so of conjectural value. Misrepresentation to be distinguished from puffs. False representations of solvency bind. Whart. Conts. 262; also false warranty.

General statement of law does not avoid; otherwise as to specific opinion. Marriage voidable when under mistake as to the person. Fraudulent marriage settlement may be set aside. Strathmore.

Employment of puffers at auction sale is a fraud.

Fraud of agent is the fraud of the principal. Cornfoot. False prospectus may release shareholders. Corporations liable for an

Fraud.—

agent's deceit. Agency must be proved by evidence *aliunde*. Agent does not bind principal for collusive acts of agent, nor in deceit for agent's independent fraud. McManus. *See* RESCISSION; RATIFICATION.

Promise made for purpose of deception only, without intention to perform, is a fraud. 1 Page, Conts. 102.

Vitiates a record. § 70, Gr. & Rud.

FRAUDS AND PERJURIES; STATUTE of: 29 Chas. II. (1676); 1 Bouv. Dic. 846; And. Dic. 477-480; 1 Beach, Conts. 502-583; §§ 287-288, Gr. & Rud.; 2 Page, Conts. 609-670; 1 Ell. Ev. 648-670; 20 Cyc. 147-322.

Leading cases: Wain: 335 (memorandum); Eastwood: 336; Birkmyr: 339 (debt, default or miscarriage of another); Baldey: 337 (sale of several articles amounting to more than $50); Lee: 338 (sale of goods to be manufactured); Peter v. Compton: 340 (contracts not to be performed in one year); Lester: 341 (equitable exceptions to the statute); Shindler: 407 (accept and receive); Tempest: 408 (acceptance of thing sold); Twyne's Case (change of possession. Fraudulent conveyances); Prince v. Case; Rerick v. Kern (oral license to occupy land); Citty v. Mfg. Co. (1843), 93 Tenn. 276, 42 Am. St. 919, n.: cases; Jordan v. Co.: 228 (pleading of).

Enacted from public policy, for protection. §§ 4, 21, 22, 42*a*, 82, 145, Hughes' Conts.

Excludes oral evidence. §§ 6, 8, 38, 39, 82-87, 145, Hughes' Conts.

Fourth section of the statute. 2 Page, 609; § 83, Hughes' Conts.; § 288, Gr. & Rud.

Seventeenth section of the statute. 2 Page, 679; § 83*a*, Hughes' Conts.; § 288, Gr. & Rud. Origin and history of; general *resume.* § 145, Hughes' Conts.

Debt, default or miscarriage of another person—collateral undertakings. Byrkmyr: 339; 20 Cyc. 160-195.

Contracts not to be performed in one year. Peter: 340; Peters, 19 Pick. (Mass.) 364, 31 Am. Dec. 142, Huff. & W. Conts. 120; 6 Rul. Cas. 297-325, ext. n. *See* CONTRACTS; Wickson, 128 Cal. 156, 79 Am. St. 36, n. (*In futuro* leases, *citing* Young v. Dake); 20 Cyc. 198, 209.

Consideration must be expressed in a contract. Wain: 335; Turner, 100 Ga. 645, 62 Am. St. 345, n.; D'Wolf v. Rabaud (1828), 1 Pet. (a widely cited case); Mentz v. Newwitter (1890), 122 N. Y. 491, 19 Am. St. 514, n., 11 L. R. A. 97-101 (essentials of memorandum); Seimers, 65 Minn. 104, 60 Am. St. 430-441, ext. n. *See* CONTRACTS; MEMORANDUM. 2 Bouv. Dic. 395.

Contract for sale of many small articles, in all of greater value than £10. 35 Ark. 190, 37 Am. Rep. 11-22, n.; Tisdale, 20 Pick. (Mass.) 9; Cummings' Cas. Priv. Corp. 604; 3 Pars. Conts. 54; 55 N. J. L. 168; Huff. & W. Conts. 132; 20 Cyc. 238-252.

Telegrams to prove contract. Brewer, 127 Cal. 643, 50 L. R. A. 240, ext. n. *Several writings to prove.* Boydell.

Goods, wares and merchandise, "accept and actually receive." Baldey v. Parker; Tempest v. Fitzgerald; Browne, Statute of Frauds; Chit. Conts.; Benj. Sales; Baker; 2 Kent, 492; 1 Beach, Conts. 562; Whart. Ev.; 37 Am. Rep. 19; 2 Whart. Ev. 874, 875. *See* CONTRACTS; SALES; L.C. 404, 406, 408. *Earnest.* See *id.*; 2 Bouv. Dic.; 20 Cyc. 238-252.

Oral evidence can supply no link of memor-

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andum or writing. Goss: 55; L.C. 52; Abell, 18 Mich. 306, 100 Am. Dec. 165-172, n.; 20 Cyc. 252-278.

Certainty essential under. *See* CERTAINTY.

Novation; doctrine of. NOVATION.

Sale of goods not in esse. L.C. 338, 404: cases.

Manufacture of articles; contracts for. Moody v. Brown (1852), 34 Me. 107, 56 Am. Dec. 640-647, n., 1 Am. Law Reg. (O. S.) 431, Williston's Cas. 191, 1 Benj. Sales, 178; Mack v. Snell (1893), 140 N. Y. 193, 37 Am. St. 534-540, n.

Sale of real estate; interest in lands. Crosby; 2 Page, Conts. 648, 666.

Fixtures. Elwes v. Mawe.

Marriage contracts not within statute. Bro. Max. 886. *See* MARRIAGE CONTRACTS; 20 Cyc. 156-158.

Possession takes contract out of statute. Hirth, 50 O. St. 57, 40 Am. St. 641, 19 L. R. A. 721; Williamson; Carr, 166 Ill. 108, 57 Am. St. 119, n.; L.C. 341.

Possession must be taken by vendee or mortgagee. 1 Chit. Conts. 571-573; Twyne's.

Validity of agreement to give property at promisor's death. Bryson, 47 W. Va. 126, 49 L. R. A. 527, n.

Statute yields to possession taken. Lester: 341. *See* EQUITABLE EXCEPTIONS; PRESCRIPTIVE CONSTITUTION.

Equitable exceptions to Statute of Frauds. Lester v. Foxcroft; Christy v. Barnhart; Clayton v. Blakey (leases void under the statute are good from year to year).

Part performance; when it takes case out of the statute. Ans. Conts. 63, 64; Lester v. Foxcroft.

Only party to be charged need sign. McPherson v. Fargo (1898), 11 S. D. 611, 66 Am. St. 723; agent may sign upon oral authority. L.C. 390. *See* MEMORANDUM.

Surrender of leases. "Act and operation of law." Lyon; Best; Ev.; Stat. Frauds, 2 Sm. L. C., 8th ed., 885-893, Pars. Conts, Wh. Ev.; Lester; Kent; Ang. Waterc. Gould, Wat.; Metcalf v. Hart (1891), 3 Wyo. 513, 31 Am. St. 122, n.; Nickells, 10 Q. B. 944 (59 E. C. L R.), 15 Rul. Cas. 512.

Oral license to enter on real estate. Prince v. Case (1835), 10 Conn. 375, 2 Am. Lead. Cas. 540, 27 Am. Dec. 675, 2 Wat. Tres., Cool. Torts; Rerick v. Kern (1826), 14 Serg. & R. (Pa.) 267, 2 Am. Lead. Cas. 546-597, n.; 16 Am. Dec. 497, n, 3 Gray, Cas. Prop. 375; Wood v. Leadbitter (1845), 13 M. & W. 838, 67 R. R. 831, 14 L. J. Exch. 161, 9 Jur. 187, 3 Gray, Cas. Prop. 359, Bro. Max. 887, Shir. Lead. Cas., 10 Rul. Cas. 11; Lambert v. Robinson (1894), 162 Mass. 34, 44 Am. St. 326, n.; Grimshaw v. Belcher (1891), 88 Cal. 217, 22 Am. St. 298, n.

Revocability of license to maintain a burden on land after the licensee has incurred expense in creating the burden. Pifer v. Brown (1900), 43 W. Va. 412, 49 L. R. A. 497-526, ext. n.; Hicks v Swift Co. (1901), 133 Ala. 411, 31 So. 947, 91 Am. St. 38, n.; Harris v. Brown (1902), 202 Pa. 16, 51 Atl. 586, 90 Am. St. 610 (revocable unless upon a consideration).

Defense is a personal plea and must be personally raised, or waived. Montgomery v. Edwards; Citty v. Mfg. Co. (1843), 93 Tenn. 276, 42 Am. St. 919, n.: cases, 9 Encyc. Pl. & Pr. 699-718; Tyson v. Despain (1896), 26 Colo. 241; Robertson v. Smith (1897), 94 Va. 250, 64 Am. St. 723; 20 Cyc. 308-322.

Contra: Solomon v. McRae (1896), 9 Colo. Ap. 23; May v. Sloan (1879), 101 U. S. 231, 25 L. ed. 797.

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Need not aver contract required is in writing. Draper v. Macon, etc. Co. (1898), 103 Ga. 661, 68 Am. St. 136, n.

Pleading of. Jordon v. Greensboro Furnace Co.: 228.

Vendor refusing to perform under contract within the statute, is nevertheless liable for damages. *Sub* L.C. 320; Luton v. Badham, 127 N. C. 96, 37 S. E. 143, 80 Am. St. 783; 210 Pa. 128, 105 Am. St. 729-789, ext. n. (liability under unenforceable contract).

Commercial paper; oral contract to accept is sufficient. § 132, Hughes' Conts.; Walker v. Lide (1845), 1 Rich. (S. C. Law) 249, 44 Am. Dec. 252, n. *See* NOVATION.

FRAUDULENT CONVEYANCES: What are. *Twyne's Case;* 1 Chit. Conts. 571-573; Hagerman, 45 N. J. Eq. 292; 14 Am. St. 732-754, ext. n.; Massey v. Gordon, *sub* CREDITORS' BILLS; *Salmon v. Bennett* (1816), 1 Conn. 525; 1 Am. L. C. 39-61, ext. n.; 7 Am. Dec. 237-240, 6 Gray, Cas. Prop. 248; *Sexton v. Wheaton* (1823), 8 Wheat. 229, 1 Am. Lead. Cas. 1-61, n.; Bradfeldt v. Cooke (1865), 27 Or. 194, 50 Am. St. 701. *See* CREDITORS' BILLS; 1 Freem. Ex. 136-143; Bouv. Dic.; 20 Cyc. 323-840.

One may prefer a creditor. Kitchen, 150 Pa. 376, 30 Am. St. 811, n.; Brooks, 11 Wheat. 78; 20 Cyc. 572-610.

Suspicious transaction may be declared a mortgage. Withrow, 56 N. J. Eq. 795, 67 Am. St. 501, n.

Remedies. *See* CREDITORS' BILLS. These are often abolished by supplementary proceedings. Lathrop; 12 Rul. Cas. 33-54, n.; *Boni judicis,* etc.; 20 Cyc. 655-840.

Intent of grantee an element. Fluegel, 7 N. Dak. 276, 66 Am. St. 642; Angle.

Burden of proof is on defendant. Russell, 133 Ala. 647, 91 Am. St. 56, n.

Creditors may avoid. § 101, Hughes' Conts.

Assignments for benefit of creditors. Grover v. Wakeman (1833), 11 Wend. 187, 25 Am. Dec. 624, 1 Am. Lead. Cas. 68, n.; *Thomas v. Jenks* (1835), 5 Rawle, 221, 1 Am. Lead. Cas. 61.

To defeat a judgment yet to be recovered for tort. Chalmers, 132 Cal. 459, 84 Am. St. 62, n.

Action by general creditor for damages against third party on account of fraud in disposing of creditor's property or preventing plaintiff from collecting his claim. Field, 99 Wis. 605, 47 L. R. A. 433-441, ext. n. When criminal. McClain, C. L. 811-852.

FRAUDULENT SALE OF MORTGAGED property. 5 Am. Crim. Rep. 242-245.

FREEDOM OF CONTRACT: Millet; Osgood v. R. R.; McClain, C. L. 55.

FREEDOM OF RELIGION: *See* CONSTITUTIONAL LAW; McClain, C. L.

FREEDOM OF THE PRESS: *See* DEFAMATION; LIBERTY.

FREEMAN v. COOKE (1848), 2 Exch. Div. 654, 6 D. & L. 187, 76 R. R. 711, 11 Rul. Cas. 82-104, n., with Pickard; Bro. Max. 291; Smith, Conts. 27. §§ 181, 182, 184 Hughes' Proc.

Equitable estoppel. Statements, if acted upon, need not be wilful. Holman v. Boyce (1892), 65 Vt. 318, 36 Am. St. 861, n.

Intent is no element in trespass. *See* Mahan v. Brown.

FREEMAN v. HOWE: L.C. 287.

FREEMAN v. KENNEY (1833), 15 Pick. (Mass.) 44. Assessments for taxation must be aptly made. Drew; Fletcher; Welty, Assess. 225.

FREMONT v. SEALS (1861), 18 Cal. 434. *Denials in an answer controlled by admission.*

FRENCH v. MILLER (1888), 126 Ill. 611, 9 Am. St. 651, n.; § 16, Hughes' Conts. S. P., Crepps; Piper. Inferior statutory tribunals are strictly judged.

Cited, p. 16; §§ 26, 180, 287, 304, Hughes' Proc.; §§ 53, 98, 108 Gr. & Rud.

Procedure; effect of contract relating to; agreement to enter appearance to waive process. See *Cognovit;* 9 Am. St. 651, n.; Kitchen v. Bellefontaine Bank (1894), 53 Kan. 242, 42 Am. St. 282, n.

Contracts regulating procedure; limitations. Bro. Max. 715; 1 Page, Conts. 347-358. *Ad quæstiones facti*, etc.; Campbell: 2: cases; Campbell v. Greer. *See* PROCEDURE; COLLATERAL ATTACK; CONSTRUCTIVE NOTICE. § 180, Hughes' Proc.

Consent will not confer jurisdiction of subject-matter. See CONSENT.

FRENCH v. TOWNES (1853), 10 Grat. (Va.) 513; 1 Chit. Conts. 405. Mistake will avoid a sale. § 114, Hughes' Conts.

FRIEND v. WARD (1905), 126 Wis. 291, 1 L. R. A. (N. S.) 891.

Agency: Filling blanks: Implied authority attends to fill blanks left in any instrument, including deeds. Angle; Hibblewhite.

Continuity: An agency is presumed to continue. Carotti: 179.

Notice of record title will protect, in the absence of notice of outstanding equities. Le Neve: 396: Williamson: 65 (possession).

FRIENDLY SUIT: *See* ARBITRATION AND AWARDS; AGREED CASE.

FRIES v. BRUGLER (1830), 7 Halst. (12 N. J. Law) 79, 21 Am. Dec. 52-62, n., 75 Am. St. 332, 339. *Cited*, § 349, Hughes' Proc.

Nemo tenetur seipsum accusare. Privilege of witness to refuse to answer a question. Counselman: 178.

FROST v. KNIGHT: L.C. 308*a*.

FRUSTRA FERUNTUR LEGES NISI subdivitis et obedientibus: Laws are made to no purpose unless for those who are subject and obedient. 7 Coke, 13. *Supervacuum*, etc. *Protection of the law-abiding is the first object of law.* See *Stare decisis; Frustra legis*, etc. Vain and fruitless things are not required. *See* CIRCUITY OF ACTION; MULTIPLICITY OF SUITS; *Res est misera*, etc. § 53 Gr. & Rud. *Outlaws not entitled to protection.*

FRUSTRA LEGIS AUXILIUM QUAERIT qui in legem committit: Vainly does he who offends against the law seek the help of the law. Bro. Max.; Armory. § 128, Hughes' Proc.

FRUSTRA PROBATUR QUOD PROBATUM non relevat: It is vain to prove what is not in question or what is not alleged and denied. 1 Ell. Ev. 143. Waldhelr v. R. R. (1880), 71 Mo. 514, 517. Borkenhagen: 81; Bristow: 135.

Cited §§ 104, 245, Hughes' Proc.

Cited § 11, 54, 60, 76, 118, 149, 167*a*, 200, 205, 245, 268, 272, 278, Gr. & Rud.

This maxim is truly fundamental. It is a part of that basic rule that judgment must be *secundum allegata et probata;* also of *Expressio unius*, etc. It is vital to a constitutional judiciary. It should be considered with the rules forbidding departures

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and variances. It involves jurisdiction and the power of a court to hear and consider irrelevant evidence. Relevant evidence must be judged from the allegations, denials and issues. What is not juridically presented cannot be judicially considered. *De non apparentibus.* A court must acquire jurisdiction of something, consider something and adjudicate something. Consequently appears the importance of the rules of certainty. Sto. Pl. 10; 240-256, citing *Certa debet esse intentio*, etc. Here it is well to state that the record or constitutional rule, "what ought to be of record must be proved by record and by the right record" applies, also, "every presumption is against a pleader": *Verba fortius*, etc. A right understanding of one of these maxims leads to a knowledge of the others. They are fundamental rules. Wherever they are disregarded will be found grave disturbances in procedure and its interlacing subjects.

These maxims apply to all judicial procedure and to all subject-matters, civil, equitable and criminal. Cases that state them and accentuate the fact that they singularly apply in the criminal case, Guedel v. P., and "from the tenderness of the law for accused persons" or the equity case mislead. *Lang v. Metzger*, 206 Ill. 475, 488 (equity); Fish v. Cleland: 12*c*. Cases that place the strict rule on the tenderness of the law for accused persons tend to mislead, for the reason of the rule is founded on the conserving principles of procedure, and from viewpoints that show that a study of procedure is a study of government. The maxim is a mandatory requirement of a constitutionalism. *U. S. v. Cruikshank.*

There must be a thing described to attract jurisdiction, and of course this thing must be certain. Pleadings are to define and present this thing, and evidence relevant thereto alone is admissible. All other is irrelevant and cannot be received by a constitutional court. It is abuse of power, or usurpation to do so; it is *ultra vires.* Such evidence needs neither objection presented nor exception reserved to make it available for review in an appellate court. *Quod ab initio*, etc. Immaterial evidence is surplusage. *Utile per inutile non vitiatur.* Incompetent evidence can-

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not be considered; it is error to receive it and it violates fundamental principles to consider it. Pleadings cannot be waived; departures and variances are forbidden. A court is bound by its record in a constitutionalism.

This maxim should be considered in connection with the conserving principles, constitutional law, certainty, the allegation, admission, the denial and the issue, also the rules above stated. *Dovaston;* LITERATURE; Slacum; 2 Cyc. 689-691; VARIANCE.

This maxim is both upheld and denied by code authors. 1 Bates Pl., Pr., Parties and Forms, 511, 512; 2 Thomp. Tri. 2310, 2311. *See* Bristow: 135; ABATEMENT; CODES.

FUGITIVES FROM JUSTICE: Can claim no rights from courts. P. v. Redinger (1889), 55 Cal. 290, 36 Am. Rep. 32, 11 Cent. L. J. 350, 1 Crim. Law. Mag. 25; *cited,* § 294, Gr. & Rud. Summeralls, 37 Fla. 162, 53 Am. St. 247. *Justice; fleeing from.* 2 Bouv. Dic. 82; 1 *id.* 857-859; 70 L. R. A. 686; § 294 Gr. & Rud.

Extradition of. See Castioni, *In re;* Bailey, Jurisdic, 383-408. Who are subject to. P. v. Hyatt (1902), 172 N. Y. 176, 60 L. R. A. 774, n.

FULL FAITH AND CREDIT IS DUE the judicial records of each state. Bouv. Dic.; McElmoyle; Haddock.

Authentication of public records. See AUTHENTICATION; 3 Wigm. Ev. 2129-2169.

FUMES: Escape of, causing damage, actionable. St. Helen's Smelting Co.; "Squib Case."

FUNDAMENTAL PRINCIPLES: Annex themselves. Oakley: 222; Dash: 237*a*; Dimes: 176; Hughes' Proc. 204.

Must be comprehended by courts. §§ 1-10, Hughes' Proc. *See* CONSTRUCTION. *Cannot be departed from.* Dash: 237*a*; Windsor: 1; 39 L. R. A. 449-451; McClatchy, 119 Cal. 413, 39 L. R. A. 691. *See* HARD CASES; DEPARTURE.

Judgments depend upon a procedure respectful of. Borden: 267; Bloom: 266; §§ 10, Sto. Pl.

Judges are bound by. Dash: 237*a*.

Right to cross-examine a witness. Wright: 201.

Natural rights; may constitutions abrogate? Oakley: 222. See *Juris præcepta; Regula pro lege si deficit lex.*

FUNDAMENTAL PRINCIPLES OF procedure. *See* CERTAINTY; *Ubi jus; Audi,* etc.; *Ex dolo malo;* Needham: 261; Bouv. Dic.; CONSERVING PRINCIPLES OF PROCEDURE.

These principles are few and brief. See §§ 46-72, Gr. & Rud.; CONSERVING PRINCIPLES.

Enumeration of. §§ 47, 83-104, 134-170, Gr. & Rud.

The mandatory requirements of a constitutionalism must first be respected by courts before they consider the rights of parties upon the record. Austin R. R.; Windsor: 1; 145 Calif. 606; Young v. McLemore; *Expressio eorum;* Hughes' Proc. 204.

Ore tenus. Demurrer. Idea in, is a fundamental. See *Ore tenus; Nemo tenetur; Audi; Jurisdictio est potestas;* Keech.

FUNDAMENTAL RIGHTS: What are. Ruhstrat v. P.: cases. *See* POLICE POWER; CONSTITUTIONAL LAW; Millett v. P.; Galbraith.

FURMAN v. FURMAN: L.C. 262.

FURMAN v. NICHOLS: L.C. 147a.

FUTURE INTERESTS: Kales (Ill.). Estate upon condition.

GAGE v. COURIER (1826), 4 Pick. (Mass.) 399. Drew. *See* TERMS OF COURT.

GALBRAITH v. ILLINOIS STEEL COMpany (1904), 133 Fed. 485, 66 C. C. A. 359, 2 L. R. A. (N. S.) 799-804. n. *Cited,* §§ 52, 662, Gr. & Rud.

Damnum absque injuria: The owner of property cannot recover from a sub-contractor who negligently constructs his part of the work and thus causes damage to the owner. There is no privity of contract. Winterbottom. *In jure non remota,* etc.

Contra: Bickford v. Richards, 154 Mass. 163, 26 Am. St. 224: citing *Coggs:* 350.

Salus populi suprema lex is a ground and *rudiment of law. Sic utere tuo ut alienum non lædas.* These interweave with another, which will suggest much that is moral, namely, "we should live honestly, harm no one and render unto every man his due." Primal covenants of society incorporated these principles in varied expressions. These are discoverable in constitutions; preambles and bills of rights often reaffirm them. They bind succeeding generations and posterity exactly as a deed binds heirs and successors in estate or title; hereto those in privity are bound.

By implication primal covenants are interpreted into all compacts. "To establish justice" this must be done. There must be remedies for that protection guaranteed by organic law. For the public welfare the primal obligations of the social compact are interpreted into the private contracts of the citizen. *Pacta conventa,* etc. R. R. v. Lockwood.

The liberal constructionist reasons from fundamental principles. These are a fountain which he ever keeps in sight. *Melius petere fontes quam sectari rivulos; Expressio eorum quæ tacite insunt nihil operatur.* M'Culloch; § 20, Hughes' Proc.

GALLAGHER v. S., Sub U. S. v. Holmes.

GALLOWAY v. STATE BANK (1900), Tex. Civ. App., 56 S. W. 236.

Presumption of regularity of court of general jurisdiction from its recitals. If the record shows void process, and an amended pleading was filed, and the court recites that service was duly served, it will be presumed that valid process was finally served. This being the last statement, it outweighs all the preceding. *See* Harrow v. Grogan; Davis v. Robinson (1888), 70 Tex. 394, 7 S. W. 749. The recital of the court overrides what the right record shows as to service of process. Treadway v. Eastburn (1882), 57 Tex. 209-215 (cites and approves *Hahn v. Kelly*).

The ground of the general demurrer cannot be raised upon collateral attack. Weems. *See* Campbell v. Porter; Campbell v. Greer; Benton; Slacum. Public policy forbids that judgments be attacked collaterally. Treadway.

GALPIN v. PAGE, 3 Sawyer, 93. L.C. 63.

GALPIN v. PAGE, 18 Wallace. L.C. 64.
GAME LAWS: Having game in possession. Phelps: 191; 7 Mews' E. C. L. 466-493; 8 Am. Cr. R. 302 (game from other states excepted); 19 Cyc. 986-1030.
GAMING: McClain, C. L. 1282-1288, 1310-1312 (devices); 2 Bish. Cr. Proc. 487-494; Bouv. Dic.; 2 Beach, Conts. 1466-1497, 7 Mews' E. C. L. 493-538. *See* WAGERS; 10 Am. Cr. R. 421; 20 Cyc. 873-968.
GARDNER v. BUCKBEE (1824), 3 Cow. 120, 15 Am. Dec. 256. This is a widely cited case in *res adjudicata. Stated* in Cromwell:.26; § 138, Hughes' Proc.
Case stated: Action on a note. Defense, plea of *res adjudicata* by general issue and notice of special matter—of the prior adjudication, which involved another note given in the same transaction and for the same consideration, and which was defeated for fraud impeaching the consideration. The defense was held sufficient.
To prevent surprise, defenses should be pleaded (McKyring: 33; Piercy v. Sabin), but the notice of new matter under existing rules was reluctantly held sufficent. Gardner.
Judge called and testified as to issues presented. Gardner; McLaughlin v. Kelly.
Codes were designed to remedy the condition in Gardner; McLaughlin; Green; Kollock; §§ 83-123, Gr. & Rud.
Constitutional law; obligation of contracts; impairment of not permissible by retrospective decisions.
Stare decisis of state and federal decisions; when each will follow the other.
Record cannot be contradicted, but persons and subject-matter may be identified and explained by evidence aliunde for a comprehension of the issue. Mondel: 77.
GARLAND v. DAVIS: L.C. 60.
GARLAND v. GAINES: L.C. 40.
GARLAND v. WHOLEBAU: L.C. 297.
GARNISHMENT: Brown, Jurisdic. 490-536; Rood on; Wap. Attach. & Garn. 428.
The situs of a debt is the domicile of a creditor for the purpose of garnishment. Louisville R. R., 118 Ala. 477, 41 L. R. A. 331, n. *Contra* cases: Nat. Bank, 2 Marvel (Del.) 35, 69 Am. St. 99-127, ext. n.; 20 Cyc. 969-1152; 58 W. Va. 388, 3 L. R. A. (N. S.) 608-619, ext. n.
Municipal corporations not liable to garnishment nor creditor suits. Divine; 1 Dill. Munic. Corp. 100, 101; Beach.
Non-resident creditor; duty of resident debtor, when garnished, to notify and to defend. Stewart, 45 W. Va. 734, 44 L. R. A. 101; P. R. R. Co., 52 W. Va. 450, 62 L. R. A. 178: cases (non-residents; when liable in).
Effect of judgment against garnishee to merge or satisfy liability of principal debtor. Bowen, 109 Iowa, 255, 47 L. R. A. 131.
Of executors and administrators. Hudson, 114 Mich. 116, 47 L. R. A. 345-366, ext. n.
Of unliquidated claims. Waples-Platter, 95 Tex. 486, 59 L. R. A. 353-392, ext. n. *See* ATTACHMENT; Bouv. Dic.
GARTH v. COTTON (1750), 1 Vesey Sen. 524, 1 Dick. 183, 3 Atk. 751, 1 Lead. Eq. Cas. 955-1027, 21 Eng. Reprint, 239, 26 *id.* 1231, 27 *id.* 1182-1196; *cited,* Sto. Eq., Pom., Bisph.; High, Injunc., 14 Mews' E. C. L. 1861.
Waste; remedies for. 1 Add. Torts, 319-374; 2 Gr. Ev. 650-656; Adams, Eq. 208. *Dilapidations; liability of landlord and tenant for; remedies.* 9 Rul. Cas. 419-512, n. *See* Todd.
GAS SUPPLY AND USE OF: 20 Cyc. 1153-1188.
GAY v. WINTER. L.C. 138.
GELPECKE v. DUBUQUE (1863), 1 Wall. 205; *cited* Cool. Const. Lim. 23, 140, 270, 272 (6th ed.), Whart. Conts. 143; 2 Page Conts. 1018-1744. *Cited* § 351, Hughes' Proc.
GENERAL ALLEGATIONS: When sufficient. *See* AIDER. § 67, Gr. & Rud.; CONCLUSIONS OF LAW.
GENERAL DENIAL: *See* GENERAL ISSUE. Pleadings are to limit issues and to narrow proofs. L. C. 34-44. *See* ALLEGATIONS; ADMISSIONS; Kollock; *Dolus.* Courts shou.d have issues made certain and specific, and to instruct the parties as to what they are. Gay: 138.
What may be given in evidence under the general issue. L.C. 33. Codes are opposed to. L.C. 34. *Cf.* Cuenin, 32 Colo. 51. *See* CODES.
GENERALE DICTUM GENERALITER *est interpretandum*: A general expression is to be construed generally. *See* CONSTRUCTION; DICTUM; Twyne's Case; Cohens: 244; *Verba fortius.*
GENERALE NIHIL CERTUM IMplicat: A general expression implies nothing certain. *See* CONCLUSION OF LAW; Cruikshank: 232; *Dolus versatur.*
GENERALIA SPECIALIBUS NON DERogant: Things general do not derogate from things special. See *Generalibus*; 34 L. R. A. 541. A general statute does not repeal a particular statute. See *Specialia generalibus;* University, 20 Utah, 457, 77 Am. St. 928; Suth. Stat. 274-278; Sedgk. Stat. 98; Felt, 19 Wis. 93; Donnelly, 125 Cal. 417, 73 Am. St. 62; London, 125 Cal. 472, 73 Am. St. 64; Rogers v. U. S. (1902), 185 U. S. 83, 88; S. v. Hammond Co. (1903), 110 La. 180, 98 Am. St. 459 (contemporaneous enactment of; each will be upheld); *Generalia. Cited,* §§ 273, 275, Hughes' Proc.
GENERALIA SUNT PRAEPONENDA singularibus: General things are to be put before particular things.
GENERALIS REGULA GENERALITER est intelligenda: A general rule is to be understood generally. 6 Coke, 65.
GENERAL ISSUE. Kollock. *See* ISSUES; Bouv. Dic.; Aslin (Ejectment), Precisely what is in issue should appear from the right record.
Objections to. Crepps: 113; Piercey; Gardner; GENERAL DENIAL; § 118, Gr. & Rud.
The precise province of the general issue in Illinois and in some of the code states has long given endless trouble. The condition affords persuasive grounds for its abolition. It is inimical to the equity and code practice. Codes were designed to abolish it.
GENERALITIES: §§ 118, 152, 178, Gr. & Rud.
Do not confer jurisdiction. *See* CERTAINTY; IDENTIFICATION; DESCRIPTION; §§ 272-279, Gr. & Rud.
GENERAL WORDS: General words followed by particular; the latter control. *Verba generalia*; Dickson: 34; Bristow: 135; Smith Conts. 558; *Ejusdem generis.*
General and special provisions in statute; construction of. McClain, C. L. 89, 90. See *Generalia specialibus.*
GENESEE CHIEF (The), (1851), 12 How. 443; Miller Const. The admiralty jurisdiction of the United States extends over its great rivers and lakes, and where there are no tides. From necessity this jurisdiction was finally asserted. *Boni judicis. Cited,* §§ 21, 22, 33, 81, 123, 158, Gr. & Rud.
Power to regulate commerce gives the control of its means, and irrespective of

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tides. A principal thing carries its incidents. M'Culloch v. Md.: 147.

Admiralty is from the Civil Law. Coke opposed its adoption. It finally came to both England and America. Howe's Civil Law, 179.

GENTRY v. U. S.: L. C. 88. *Cited* § 22, Hughes' Proc.

GEORGE v. CLAGETT (1797), 8 T. R. (D. & E.) 359, 4 R. R. 462, Peake, Add. Cas. 131; 2 Sm. Lead. Cas. 118-124, n., 8th ed., 1358-1371, 9th ed., 138-145, 11th ed. (reviews English cases); Frazier, 78 Ark. 24, 115 Am. St. 33; Mech. Ag., Sto. Ag., Whart. Ag., Pars. Conts., Chit., Smith, 436, 2 Mews' E. C. L. 868, 884, 12 *id.* 701, § 324, Hughes' Proc.; *Cited*, § 303, Gr. & Rud.

Agency; factors; set off by purchasers from agents acting for undisclosed principals against such principals. George v. Clagett. Consignment for sale vests title, when. Ætna Powder Co. v. Hildebrand (1894), 137 Ind. 462, 45 Am. St. 194-210, ext. n.

Factor's duty to account to his principal; and of his liability to an action without previous demand. *Clark v. Moody* (1821), 17 Mass. 145, 1 Am. Lead. Cas. 836-855, n.; Whart. Ag., Pars. Conts., Chit.

Factors and Brokers. 8 Encyc. Pl. & Pr. 828-839; Anson, Conts. 346-351.

GERARDE v. LA COSTE: Swift v. Tyson.

GIBBONS v. OGDEN (1824), 9 Wheat. (U. S.) 1 (6 L. ed. 23 n.), Marshall, Constitutional Decisions, 421-467, Thayer, Const. Cas. 1799; Tucker, Const., 1 Kent, 429-439, 9 Va. 299, 44 Am. St. 911, Gould, Waters, Pom. Const. Law; *Wabash R. R. v. Ill.* (1886), 118 U. S. 557 (30 L. ed. 244); *Covington Bridge Co. v. Kentucky* (1894), 154 U. S. 204; *Brennan v. Titusville* (1894), 153 U. S. 289-308 (38 L. ed. 719); *Asher v. Texas* (1888), 128 U. S. 129; *Turner v. Maryland* (1882), 107 U. S. 38, 22 Am. Law Reg. 198-213, n.; *Western Union Tel. Co. v. New Hope* (1902), 187 U. S. 419; *Atlantic & Pacific Tel. Co. v. Philadelphia* (1902), 190 U. S. 160 (47 L. ed. 995). *See* Hughes' Proc. for statement and cases, cited, pp. 633-634.

Cited, §§ 47, 268, Gr. & Rud.

Commerce and its incidents are within national protection. Gibbons; Bartemeyer; Brown v. Maryland; Woodruff v. Parkham.

GIBBS v. BENJAMIN. L.C. 405.

GIBLER v. MATTOON. L.C. 96.

GIBNEY v. S. (1893), 137 N. Y. 1, 33 Am. St. 690, 19 L. R. A. 365, 36 Am. St. 848, 849; Busw. Pers. Inj., *sub* White v. County, *sub* Hill v. Boston, 195 Pa. 461, 49 L. R. A. 724 (states—counties—liability for torts). §§ 309, 348, Hughes' Proc.

Proximate cause; negligence. If a child falls through a negligently constructed bridge into water, and the father, to save life, jumps into the water and is also drowned, the defective bridge is the proximate cause, and a recovery is allowed. The unsafe bridge is the proximate cause of death of both parent and child. *Guille; Sweeney;* "Squib Case"; *West Chicago R. R. v. Liederman* (1900), 187 Ill. 463, 79 Am. St. 226, n. (risking life to save another).

GIBSON v. WARDEN (1871), 14 Wall. (U. S.) 244, 20 L. ed. 797; Mech. Ag. 95. *Cited*, § 80, Hughes' Conts.

Sealed instruments; seals. Seal is surplusage to instrument not necessarily a deed, *e. g.*, a chattel mortgage.

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Gibson; Mech. 95, 816, Huffc. 26, 127, 188, Reinh. 226; Edwards, 147 Ill. 14, 37 Am. St. 199; Ford v. Williams (1856), 13 N. Y. 577, 67 Am. Dec. 83; Worrall v. Munn, 389. *See* 1 Danl. Nego. Insts. 31-34, 1 Rand. Com. Paper, 70, 74, 89 Am. Dec. 231.

Contra: A lease need not be under seal but if it is, its terms are as conclusive as those of any deed, and cannot be contradicted by oral evidence, *e. g.*, by a simple writing, not under seal, indorsed upon the lease while it remains unexecuted.

Loach v. Farnum (1878), 90 Ill. 368, 8 Cent. L. J. 352, 1 Beach, Conts. 779, Ans. (rules as to sealed instruments); Bish. 130. *See* Canal Co. v. Ray (1879), 101 U. S. 522. *Cf.* Moses v. Loomis (1895), 156 Ill. 194-199, n. (waiver of conditions by consent). *Nihil tam conveniens*, etc. Note, 60 Am. Dec. 744; 22 Am. Rep. 12; Hibblewhite.

Superfluous seal may be disregarded. 2 Pars. Conts. 841, Mech. Ag. 95, 141; Long v. Hartwell (1893), 34 N. J. Law, 116, Mech. Cas. Ag. 92; Thomas v. Joslin (1883), 30 Minn. 388, Mech. Cas. 427; Smythe v. Lynch (1896), 7 Colo. Ap. 383. *See* Cooke: 321.

An executed oral agreement may modify one under seal. McKenzie v. Harrison (1890), 120 N. Y. 260, 8 L. R. A. 257.

Contracts under seal, if supplemented by parol contract, then the specialty merges into the parol agreement; and if a seal be added to this, then all again becomes a specialty, or *e converso.* Price v. Moulton (1851), 10 C. B. 561 (70 E. C. L. R.), Bish. Conts. 129-136: cases; 9 Mews' E. C. L. 1018; French v. New (1863), 28 N. Y. 147; Whiting v. Heslep (1854), 4 Cal. 227.

Terminating contracts under seal by parol. 1 Beach, Conts. 779. *Seal; when surplusage. See* SEAL; 1 Rand. Com. Paper, 73; Reinh. Ag. 60, 226, 333.

GIFT: Ward v. Turner (1751), 2 Vesey, 431, 1 Dick. 170, 1 Lead. Eq. Cas. 1205-1251, 21 Eng. Reprint, 234, 28 *id.* 555, 2 Gray, Cas. Prop. 170, 9 Rul. Cas. 811-868, 2 Kent, 446, Bouv. Dic.; 89 W. Va. 12; Thornton, Gifts; 2 Rand, Com. Paper, 807, 1 Danl. Nego. Insts, 24, 26, 1 Pars. Conts. 248, 3 Pom. Eq. 1146-1151, 2 Beach, Eq. 1464; 15 Mews' E. C. L. 321 (Will—*Donatio mortis causa*); 7 *id.* 555-575; 20 Cyc. 1189-1245. *Cited*, § 331, Hughes' Proc.

Ward v. Turner stated: Fly owned South Sea annuities, and when about to die, called Moseley, a distant relative and attendant, and gave him receipts for the stock. F. died, and afterward M. W., executor of M., sued T., the executor of F., for the stock, but failed; for it was held there was not a sufficient delivery of the stock to constitute a gift.

Harris, 3 N. Y. 93, 51 Am. Dec. 352; Page, 89 Va. 1, 18 L. R. A. 170, 187, n.; Denigan, 127 Cal. 142, 78 Am. St. 35, n. (by deposit in bank); Crook v. Bank, 83 Wis. 31, 35 Am. St. 17, n. Bank book is not sufficient. Jones, 90 Ala. 441, 19 L. R. A. 700, n.; Ridden, 125 N. Y. 572, 11 L. R. A. 684, n., 21 Am. St. 758; Whalen, 89 Md. 199, 44 L. R. A. 208; Williams v. Guile (1889), 117 N. Y. 343, 6 L. R. A. 366 (*causa mortis*); Check. Pickslay, 149 N. Y. 432, 52 Am. St. 740, n.; Cowen, 94 Tex. 547, 553 (followed).

Gift.—

Irons v. Smallpiece (1819), 2 B. & Ald. 551, 21 R. R. 395, 12 Rul. Cas. 408-441, ext. n.; Pars. Conts., Chit., Bish., Sto. Eq., Pom. Eq., Thornton, Gifts; 7 Mews' E. C. L. 556 (Gifts), 14 *id*, 301, 15 *id*. 320. *Cited*, § 331, Hughes' Proc.

Irons v. Smallpiece stated: I. orally gave his son two colts, but without *possession*. Then I. died, and the donee sued S., the executrix, in trover for the colts; but, like Ward, he failed upon the element of *possession*.

Possession of the gift or otherwise of a deed or instrument of gift, is essential in absence of delivery of possession. Atty. Gen., 14 Gray (Mass.) 586; 2 Kent. 629.

Gifts. 2 Kent, 438-448, 2 Beach, Eq. 1042-1067; Wadd, 137 N. Y. 215, 21 L. R. A. 693-699, ext. n.; Thornton, Gifts and Advancements (1892).

Gifts causa mortis. Thomas, 89 Va. 1, 35 Am. St. 17, n.; Ward.

Revocation of. A ring given in contemplation of marriage may be recovered of the donee if she breaks the engagement. Thornton, Gifts, 94.

Gifts inter vivos. 12 Rul. Cas. 408-441: cases, n. Essentials. *See* GIFTS, where is *cited* Ward; Irons; Ans. Conts. 12. §§ 51, 66, Hughes' Conts. When suggestive of undue influence. Ans. Conts. 166. *See* Chesterfield.

Definiteness necessary for charitable gifts. Harrington, 105 Wis. 485, 50 L. R. A. 307, n., *citing* Tilden v. Green.

GILL v. U. S. (1895), 160 U. S. 426-438, 40 L. ed. 480. *Cited*, § 55, Gr. & Rud.

Estoppel; waiver. A person looking on and assenting to that which he has power to prevent is precluded ever afterwards from maintaining an action for damages. *Volenti non fit injuria*.

A patentee can not claim royalty on an implied assumpsit for benefits he has conferred upon his employer by the use of his invention while perfecting it and setting it in practical operation.

A patentee loses his right to a patent by allowing its use by others without protest or interdiction. His intention will not control; it is inferred from acts and conduct. Gill v. U. S., *citing* Pennock v. Dialogue (1829), 2 Pet. 1, 7 L. ed. 327. *Res ipsa loquitur*.

A license from a patentee or an author is inferred from his acquiescence, and this operates as a waiver of his rights to a patent or a copyright.

As an author may waive his rights so may one complaining of error. Consensus tollit errorem. § 53 (Convenience), Gr. & Rud. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for where gifts are once made to the public in this way they become absolute. Pennock; Gill v. U. S.

GILMORE v. DRISCOLL: Smith v. Thackerah.

GILPINS v. CONSEQUA (1813), Pet. C. C. 91, 221. *Cited*, Chit. Conts. One may contract for an impossibility if he chooses. § 118, Hughes' Conts; Paradine.

GILSON v. DELAWARE, ETC., CANAL Co. (1892), 65 Vt. 213, 36 Am. St. 802-861, ext. n. Mech. Cas. Dam. 247. *In jure non remota*, etc.; proximate and remote causes in torts and contracts. The "Squib Case" and its cognates most fully discussed.

Cited, §§ 343, 348, Hughes' Proc.

Cited, §§ 67, 68, 295, 296, Gr. & Rud.

This case is a cognate of *Fletcher v. Rylands*, and states *Rylands v. F., Smith v. Fletcher, Cahill v. Eastman*, and its notes are the ablest presentation of *In jure non remota*, etc. In Gilson, 36 Am. St. 802-861, are discussed *Scott v. Shepherd (Squib Case)*, pp. 847, 848, *id.; Vicars v. Wilcox*, pp. 809, 844, *id.; Sharp v. Powell*, pp. 809, 820, *id.; Lynch v. Knight*, 810, 845, *id.; Fent v. Toledo R. R.*, 810, 824, *id.; Metallic, etc., Co. v. Fitchburg*, 812, 826, *id.; Winterbottom v. Wright* (92 Am. St. 497, 813), *Losee v. Buchanan*, 813; *Carter v. Towne*, 814; *Dixon v. Bell*, 814; *Thomas v. Winchester*, 814; *Langridge v. Levy*, 815; *Heaven v. Pender*, 46 L. R. A. 33-112, 36 Am. St. 815; *Gibson v. Leonard*, sub *Ad ea quæ frequentius*, etc. (breach of statutory duty, how pleaded); *Welch v. Wesson*, 36 Am. St. 818; *Sutton v. Wauwatosa*, 819; *Salisbury v. Herckenroder*, 819, 820; *Burrows v. March Gas Co.*, 822; *Victorian R. R. Com'rs v. Coultas*, 828; *Lynch v. Nurdin*, 835; *Lord Bailiffs-Jurist of Romney Marsh v. Corporation of Trinity House*, 838; *Blyth v. Birmingham Water Works Co.*, 838; *Nichols v. Marsland*, 838, 840; *Lumley v. Gye*, 840, 843; *Ashby v. White*, 841; *Brown v. Collins*, 847; *Vanderburgh v. Truax*, 848; *Guille v. Swan*, 849; *Stokes v Saltonstall; Ingalls v. Bills; Ionides Case*, 855; *Brown v. Chicago R. R.*, 820, 859; *Gibney v. S*. The above cases extendedly introduce the subject of torts.

The liability to third persons of lessors of real or personal property. Griffin, 128 Mich. 653, 92 Am. St. 496-562, ext. n.; Todd: Indemaur.

GILSON v. SPEAR (1865), 38 Vt. 311, 88 Am. Dec. 659, Ewell, Lead. Cas. Inf. 201; Nash, 15 Am. St. 931, 61 Vt. 501, 4 L. R. A. 461, 2 Beach, Conts. 1370, 1 Pars. 342, Ans., Cool. Torts, 123, 127, 113 (rules), Bigl. Fr. 355, 356, 2 Kent. 241. *Cited*, § 63, Hughes' Proc.; also § 1, Hughes' Conts (CRIMES).

Cited, §§ 67, 296, 301, Gr. & Rud.

An infant is not liable for his torts if they arise out of a contract. Green (1816), 2 Marsh. 435, 4 E. C. L. R.; 7 Mews' E. C. L. 1460, 10 *id*. 523, 528; Johnson v. Pye (or Pie) (1666), 1 Keble, 913, 1 Levinz, 169, Bish. Conts. 902; Slayton, 175 Mass. 513, 78 Am. St. 510, *reciting* Craig; Churchill, 58 Neb. 22, 76 Am. St. 64: cases, n.

Is liable for his torts like an adult; e. g. Scott, an infant, obtained a judgment against Shepherd for throwing a squib. This was the notable "Squib Case" just observed of in *Gilson*. O'Leary, 7 N. Dak. 554, 41 L. R. A. 677, n., 2 Kent, 236-241; Stringer, 116 Ind. 477, 9 Am. St. 875, 2 L. R. A. 714 (infant riding over foot passenger), Busw. Pers. Inj. (child of seven, liable).

GLITTERING GENERALITIES: Use of. Tiede. Pol. Power; *Dolus*, etc. *See* CONCLUSIONS OF LAW; Twyne's Case. *Generale*, etc.

GLOSSA VIPERINA EST QUAE CARrodit viscera textus: That is a viperine gloss which eats out the vitals of the text. 10 Coke, 70; 2 Bulst. 79. Spirit of the law controls construction. *Benedicta*.

GODDARD v. WINCHELL (1892), 86 Iowa, 71, 41 Am. St. 481, 17 L. R. A. 788, 1 Am. & Eng. Encyc. Law, 908, 2d ed.; 1 Warv. Vend. 8.

Accretion; meteor; ærolite. This belongs to the owner of the fee of the land upon which it falls. Goddard; Oregon Iron Co. v. Hughes, 81 Pac. 572; And. Dic.: "Accretion," *citing* 16 Alb. Law Jour. 76,

Goddard.—
13 Ir. Law Times, 381. •A passenger on the highway, or the discoverer of such stone, cannot claim it, the highway being a mere easement for travel only. Dovaston. The stone coming out of the superincumbent air above the land naturally belonged to him upon whose land it fell, and from a trespass theory it belonged to such owner; and also agreeably to *Qui sentit commodum*, etc., upon the idea that as the owner of the land must lose what the air and water carry away, so on the other hand he is entitled to whatever deposits they may make. And this is true of gradual growths and accretions from water. *Accessorium non ducit.*

GODFREY v. S. (1858), 31 Ala. 323, 70 Am. Dec. 494, ext. n. (rules of R. v. York stated); 1 Bish. C. L. 368, 371, 2 Wh. Ev. 1271.
Cited, § 16, CRIMES, Hughes' Conts.
Cited, § 304, Gr. & Rud.
Infants; criminal liability; rules. R. v. York, 3 Gr. Ev. 4; Martin v. S. (1890), 90 Ala. 602, 24 Am. St. 844, n. (*stating* Godfrey v. S.); S. v. Yeargan (1895), 117 N. C. 706, 36 L. R. A. 196-211, ext. n., 1 Bish. C. L. 367-373, Bish. Torts, 544-591, 1 Gr. Ev. 28; *Actus non facit reum*, etc.

GODSALL v. BOLDERO (1807), 9 East, 72, 2 Sm. L. C. 293-300, 8th ed., 1530-1564, 9th ed., 263-271, 11th ed. (reviews English Cases); Greenh. Pub. Pol. 285-287; 104 Ga. 448, 44 L. R. A. 374, 8 Rul. Cas. 434, 11 Mews' E. C. L. 254, Ans. Conts. 181, Suth. Dam., 2 Pars. Conts. 593, 594, 3 Add. 1222, 1232. *Cited*, §§ 158, 299, Hughes' Proc.
Life insurance is a contract of indemnity. Contra, Dalby v. Insurance Co.; Ans. Conts. 181, 44 L. R. A. 374. One may recover from one causing damage, and also from the underwriter, exactly as the owner of land may recover from one burning his premises, and also from the underwriters; or where a tenant must rebuild. Polack.
Husband has no interest in wife's property. He cannot insure the tenement he builds on her land. Tyree, 55 W. Va. 63, 104 Am. St. 983, 992, n.
Insurable interest. Locke v. North Am. Ins. Co. (1816), 13 Mass. 61, 2 Am. L. C. 926-940, ext. n., Greenh. Pub. Pol. 288-291; *Lazarus v. Comm. Ins. Co.* (1827), 5 Pick. 76, 2 Am. L. C. 797-863, Mech. Ag. 756, 983, 2 Pars. Conts. 465, 466, 549; Carter.

GOLD: 1 Bouv. Dic. 886. *See* DOLLAR.

GOLDSMITH v. JOY (1899), 61 Vt. 488, 15 Am. St. 923, 4 L. R. A. 251. *Cited*, § 313, Gr. & Rud.

GOODENOW v. TYLER (1810), 7 Mass. 36, 5 Am. Dec. 22, 1 Am. Lead. Cas. 788-805, Laws. Us. & Cus. 180. *Agency; custom; usage.* Custom governs agent's powers. *Note*, 50 Am. Dec. 103.

GOOD FAITH: Will not excuse adultery. 1 Am. Cr. R. 42; *id.* 468 (nor instructions to employe not to sell liquor. P. v. Robey). *See* Bouv. Dic.

GOOD MORAL CHARACTER: Bouv. Dic.

GOODRICH v. MITCHELL (1904), 68 Kans. 765, 75 P. 1034, 104 Am. St. 429.
Class legislation; statutes may give preference to veterans. See CONSTITUTIONAL LAW; EQUAL AND UNIFORM LAW.

GOODS, WARES AND MERCHANDISE: Ans. Conts. 17, 57, 61; 6 Cyc. 365-533 (Carriers).

GOOD v. ELLIOTT, L.C. 358.

GOOD WILL: Mitchel; Mallan (sale of); 1 Bouv. 888-890; And. Dic.; 7 Mews' E. C. L. 575-595; 20 Cyc. 1275-1284.
Of a partnership and the means of making it productive on death of a member or dissolution. Slater, 175 N. Y. 143, 96 Am. St. 605-619, ext. n.

GOODWIN v. TELEPHONE CO. (1904), 136 N. C. 258, 67 L. R. A. 251. *Cited*, § 52, Gr. & Rud.

GORDON v. GORDON (1816), 3 Swanst. 400, 36 Eng. Reprint, 910, 19 R. R. 230, 12 Rul. Cas. 110-138, ext. n.; Kerr on Fraud, 2 Pom. Eq., 1 Sto. Eq., 1 Per. Trusts, Bro. Max. 266, 15 Mews' E. C. L. 771.
Gordon v. Gordon stated: A younger brother disputed the legitimacy of the elder brother, who was thus induced to compromise the family estate; but the younger knew of a private marriage of the father with the mother of the elder, of which the latter was ignorant; learning the fact nineteen years after the compromise, he sought and found relief, upon the ground of concealment.
Mistake in contract destroys assent. Boston Ice Co.; Brown; Ans. Conts. 126, 2 Chit. 1022-1035.
Compromise, when equity will set aside. Stapilton; W. & T. Lead. Eq. Cas.; Stewart, 6 Clark & Fin. 911, 971; *cited*, Bro. Max. 266.

GORE v. GIBSON. Sub U. S. v. Drew; Beverley's Case: 416.

GOSS v. NUGENT, L.C. 55.

GOVERNMENT: The position of government must be considered throughout procedure. It declares the supreme law of the land which is made up of the conserving policies of procedure as illustrated and discussed in the Introduction, Hughes' Proc., also §§ 83-123, Gr. & Rud.
Procedure is that part of the law which deals with the establishment of judgments and sequestrating orders conformably to the requirements of the due administration of justice.
The tests of an adjudication profoundly involve governmental questions, its polity, ends and purposes. §§ 1-12, Hughes' Proc.; *Audi; Coram judice;* DUE PROCESS OF LAW; MANDATORY RECORD.
The study of procedure is a study of government. Blake; Cruikshank; Tyler v. Pomeroy; CONSTITUTIONALISM; §§ 28-35, 45, 79, Hughes' Proc. This proposition is a sequence of the foregoing observations. To illustrate this important view the citation of the following cases throughout this work should be consulted, namely, *M'Culloch, Martin v. Hunter* (see *Coram judice*), *Cohens, Tarble's, Marbury, Blake, Gibbons, Windsor, Trist*, and cases cited in relation to due process of law and *Audi alteram partem.* These cases are an able exposition of constitutional law, are most instructive on construction and burdened with procedure as well. §§ 79, 88, Hughes' Proc.
Prescribes procedure. §§ 62, 84, 146, 147, 207, 268, Gr. & Rud. Duty to prescribe certain laws. §§ 76, 267-268, *id.* Liability for wrongs. § 64, *id.; see* SOVEREIGNTY; *Rex non potest peccare.*
Great charters re-asserting the maxims of reason, justice, protection, right, duty and obligation are not greater than the blocks from which they are constructed. Nor are they complete. They are always lacking. They have to be filled, rounded out and rightly applied by construction. *Expressio eorum*, etc.; M'Culloch. Relating to this view there is much contention between the strict and the liberal constructionists. *Ita lex scripta est; Lex*

Government.—
non exacte, etc.; *Regula pro lege, si deficit lex.* §§ 45-72, 83-123, Gr. & Rud.; Hughes' Proc. 204; Galbraith.
In every government of stability and protection are fixed rules of official action and of evincing these actions. Proceedings without authority are called *Coram non judice;* also proceedings not properly evinced. Record requirements are indispensable; Crain; Iverslie: 46: cases.
Cujus est instituere, etc. Hughes' Proc.
The consequences of a disregard of the vital requirements of a constitutionalism can not be repressed by great executives who do not understand the insidious causes of social convulsions and a rising contempt for lawlessness in high places.
Limitation of powers of. See DIVISION OF STATE POWER; CONSTITUTIONAL LAW; Dennett; Flournoy: 145, 146; Trist: 214; Hughes' Proc. 204.
To affect procedure. Indianapolis: 223. *See* PROCEDURE. §§ 24, 45, 156, 169, 239, 187, 214*a*, Hughes' Proc.
When the rights of the citizen and of government concur the latter is preferred. Quando jus domini, etc.; Bro. Max. 69-72; Giles v. Grover (1832), 1 Cl. & Fin. 72, 9 Bing. 128, 2 Moo. & Sc. 197, 5 Eng. Reprint, 598, 6 *id.* 843, 5 Mews' E. C. L. 34, 37, 44.
States as parties to suits. Missouri v. Illinois, 180 U. S. 208: cases; 8 Rul. Cas. 199. *See* States; Hunsaker v. Borden, 40 Wis. 200.
Federal constitution only binds the states where they are named to be bound —important rule. *Roy n'est lie per ascun*, etc.; 8 Rul. Cas. 203; Barron: 241 (very important rule).
Not liable for torts, etc. Rex non potest peccare; sub Hill v. Boston.
Created courts to remedy wrongs, for wronged persons, and for nothing else. *See* PARTIES; *Fabula non judicium;* Bro. Max. 329, n., 342; *Jurisdictio est potestas*, etc.; Wonderly.
Contracts of government and public corporations. 2 Page, Conts. 1000-1004. Judgments against; who bound by. 116 Ky. 164, 105 Am. St. 197-218, n.
GRACE v. MITCHELL (1872), 31 Wis. 533, 11 Am. Rep. 613; Ald. Jud. Writs, 170; Savacool: 164.
Cited, § 122, Gr. & Rud.
Regular process essential for an officer, and besides, he must act bona fide. 74 Am. St. 24-27. Officer cannot validate his process by alterations. Leachman, 81 Ill. 324 (altered process is no defense).
GRADWOHL v. HARRIS (1865), 29 Cal. 150; Pom. Rem. 127, 450; Bliss, Pl. 31, 63.
GRAHAM v. FOLSOM (1905), 200 U. S. 248.
Construction; impairment of contracts. Legislatures can not impair the obligation of contracts by repeal of county and township acts of organization and merger of them into other entities.
Courts cannot permit themselves to be deceived. "What can not be done directly cannot be done indirectly." Ilsley; Webb; Pabst Co.
Legislatures cannot impair contracts. Hanford: 86; Bronson: 238.
GRAIN v. ALDRICH (1869), 38 Cal. 514, 99 Am. Dec. 423-426; Pom. Rem. 127.
Part of a claim may be assigned. Assignee of a part may sue for it. Pom. Rem. 127, n.; Harris County, 68 Tex. 22, 2 Am. St. 467-475, ext. n.; Merchants' Bank, 18 Mont. 335, 56 Am. St. 586. *See* McDaniel, 21 Oreg. 202, 28 Am. St. 740-746, n.
GRAINGER v. HILL (1838), 4 Bing. N. C. 212, 33 E. C. L. R., 5 Scott, 561, Ames, Cas. Torts, 580, Chase, Cas. 107, Bigl. L. C. 138, 184, 4 Mews' E. C. L. 1487, 9 *id.* 702, 12 *id.* 1177.
Malicious abuse of process actionable. McCardle. *Executio juris*, etc.; Bro. Max. Countess of Rutland's Case (1606), 6 Coke Rep. 53: *stated*, Bro. Max. 131. *See* ARREST.
Malicious attachments. Drake on Attach. 724, 745, 7th ed.; Blair: 170; Trapnall (liability on attachment and injunction bonds). *See* MALICIOUS ACTS; FALSE IMPRISONMENT.
Void proceedings, liability of one swearing to affidavit showing no cause of action. Whaley, 62 S. C. 91, 56 L. R. A. 649 (affiant not liable for); West v. Smallwood; Oats v. Bullock (1902), 136 Ala. 537, 96 Am. St. 38 (void warrant no protection).
GRAINGER v. S. U. S. v. Holmes.
GRAMMATICA FALSA NON VITIAT chartam: False grammar does not vitiate a deed. 9 Coke, 48. *See* CONSTRUCTION; *Falsa.*
Grammar and punctuation in construction of statutes. McClain, C. L. 106.
GRAND JURY: Find indictments. Art. V, Constitution of the United States. What constitutes. S. v. Vincent (1900), 91 Md. 718, 52 L. R. A. 83; 20 Cyc. 1291-1356.
Plea in abatement to drawing of. 7 Am. Cr. R. 220. *Generally:* Bouv. Dic. 896-900; 4 Mews' E. C. L. 1791; Am. Cr. Reports.
GRAND TRUNK R. R.: L.C. 290c.
GRATUITOUS PROMISE: Void unless made under seal. Ans. Conts. 12, 49, 70. *Ex nudo.*
GRAVAMEN: *See* GIST; GROUND OF ACTION; Bouv. Dic.; CAUSE OF ACTION.
GRAVER v. FAUROT: L.C. 103.
GRAVIUS EST DIVINAM QUAM TEMporalem lædere majestatem: It is more serious to hurt divine than temporal majesty. 11 Coke, 29. *Summa ratio*, etc.
GREELEY v. SMITH: *Res Adjudicata.*
GREENLEAF'S EVIDENCE: An invaluable work. *See* INTRODUCTION, Hughes' Proc.
Important sections referred to: Vol. I, §§ 63-65 (Variance), 528-533 (*Res adjudicata*); Vol. II, § 7 (Certainty); Vol. III, § 10 (Due Process of Law). *See* ORAL EVIDENCE.
Vol. II is an excellent gathering of contract matter; Vol. III of criminal matter, also of equity.
GREENOUGH v. GASKELL (1833), 1 M. & K. 98, 39 Eng. Reprint, 618, Gr. Opin. by Gt. Judges, 323-338; Thayer, Cas. Ev. 1143, n.; *cited*, Cool. Torts, 617, 157 Mass. 92, 34 Am. St. 260, 1 Wh. Ev. 576, 577, 579, 588, 2 Best, Ev. 578-587, 1 Gr. Ev., 5 Mews' E. C. L. 920, 943; Whiting, 30 N. Y. 330, 86 Am. Dec. 385; *cited*, Cool. Const. Lim. 407.
Privileged communications; evidence excluded from public policy; attorneys. A party, but not his attorney, must disclose all he knows; communications made to counsel are sacred, and ought never to be disclosed; information given in procuring professional advice is protected without reference to litigation pending or contemplated. Restrictions about this are no longer followed. Lord Tenterten's attempts to restrict to cases where litigation is pending or contemplated were subsequently abandoned by him. O'Brien, 102 Ga. 490, 66 Am. St. 202-243, ext. n. (attorneys as witnesses).
Physicians; when they may testify. *Thomp-*

Greenough.—

son v. Ish (1899), 99 Mo. 160, 17 Am. St. 552-571, ext. n.; 2 Best, Ev. 582.

Generally: 1 Gr. Ev. 236-254; 1 Tay. Ev. 829-868; 2 Beach, Eq. 866-870; 1 Wh. Ev. 576-608; Mech. Ag. 880-887; 2 Best, Ev. 378-387; 1 Ell. 621-647; 3 Wigm. Ev. 1805. *See* Hughes' Proc.

GREEN v. PALMER: L.C. 90.

GREGORY v. PIPER: Sub M'Manus.

GRIDLEY v. BLOOMINGTON: Bristow: 135. *Cited*, p. 30, Hughes' Proc.; Fish v. C.

GRIGG v. P. (1878), 31 Mich. 471. Crain.

GRISWOLD v. WADDINGTON (1819), 16 Johns. 438, Snow, Int. Law, 274: cases; 1 Kent, 66-68, 2 *id.* 467; 1 Rand. Com. Paper, 250, 251, 1 Danl. Nego. Insts. 216, 217, 222, 678*a*, 2 *id.* 1062, 1 Pars. N. & B. 152, Thomp. Bills, 73, Sto., notes, § 94, 1 Chit. Conts. 259, 321, 2 *id.* 1000, 2 Beach, 1558, Whart. 93, 94, Gr. Pub. Pol. 278, 2 Kent, 467, 3 *id.* 28, 62, 67, 256.

Cited, § 133, Hughes' Conts.; § 158, Hughes' Proc.; § 282, Gr. & Rud.

Aliens, if friendly, may contract with other persons. Contracts with alien enemies are void. Wheat. Int. Law, 556, 1 Kent, 67; 1 Danl. Nego. Insts. 216, Ans. Conts. 104, Bish. 100, 1 Kent, 55, 56, 67, 1 Add. Conts. 193, Smith, 239, Whart. 93, 94; Barrick, 16 C. B. (N. S.) 492, 81 E. C. L. R., 3 E. C. L. R. 921; 6 Mews' E. C. L.

Calvin's Case (1609), 7 Coke Rep. 1, Broom, Const. Law, 4, 2 Rul. Cas. 575, Bro. Max. 75.

Domiciled aliens may be deported at will of a government where they reside. Fong Yue Ting v. U. S. (1903), 149 U. S. 698 (Chinese exclusion act held valid, Brewer, Field and Fuller, JJ., dissenting).

Contracts with aliens and insurgents contrary to public policy. Gr. Pub. Pol. 379-382; Ans. Conts. 104; 1 Add. 194.

Power to inherit and hold lands. *Note*, 36 Am. St. 437; C. v. Hite (1835), 6 Leigh (Va.), 588, 29 Am. Dec. 226-235; Dev. Deeds, 124-132; Wunderle v. *id.* (1893), 144 Ill. 40, 19 L. R. A. 84-92: cases; And. Am. Law, 2 Kent, 560. *See* cases, 31 and 32, L. R. A.

Plea of; alienage requisites. 2 Gr. Ev. 19; Sto. Eq. Pl. 722, 724; Bro. Max. 187. Right to sue. 36 Am. St. 437; 1 Wash. R. P. 74.

Generally. See 1 Rand. Com. Paper, 248-255, 1 Danl. Nego. Insts. 216-222, 1 Pars. N. & B. 151, 152, Gr. Pub. Pol. 369-382; Bish. Conts. 997-1002; 1 Dev. Deeds, 124-132; Jones, Ind. Leg. Per. 14, 1 Kent, 66-70; 2 Bouv. Dic. 469, 470.

Cited, § 133, Hughes' Conts.

GROTIUS: Wrote international law. §§ 35, 77, 139, 150, Gr. & Rud.

GROUND RENTS: 20 Cyc. 1369-1391.

GROUNDS AND RUDIMENTS OF LAW are interpreted into all compacts. §§ 34, 45, 72, Gr. & Rud. *Lex non exacte.*

Enumeration of. §§ 46-71, 47, 50, *id.*

Judicial notice involves. § 309, *id.*

GROVER v. WAKEMAN: Assignment for benefit of creditors. *See* FRAUDULENT CONVEYANCES.

GROWING CROPS: Emblements, when. Crosby v. Wadsworth; Bouv. Dic.

Sale of. 1 Mech. Sales, 340.

GUARANTY: *Douglass v. Reynolds* (1833), 7 Pet. 113, 8 L. ed. 626, 2 Am. Lead. Cas. 38, 141, ext. n., 4 L. R. A. 345, 346, 1 Bouv. Dic. 906-910; Ans. Conts.; 3 Suth. Dam. 724, 734; Rand. Com. Paper, Danl. Neg. Inst., Pars. N. & B., 2 Pars. Conts. 31, 1 Chit. 743, Smith, 116; Jones,

Guaranty.—

Construc. Conts. 250, 252, 3 Kent, 124; 20 Cyc. 1392-1498; Bishop v. Eaton (1894), 161 Mass. 496, 42 Am. St. 437, n. (notice of acceptance of guaranty, when essential); Plattner v. Green (1881), 26 Kan. 252 (notice not necessary); Fall, 67 Minn. 83, 64 Am. St. 390-403, ext. n. (guaranty of collection of commercial paper); Davis Sewing Machine Co., 115 U. S. 524 (notice of acceptance essential).

Lent v. Padelford (1813), 10 Mass. 230, 6 Am. Dec. 119-123, 2 Am. L. C. 33-141, ext. n., 2 Danl. Nego. Insts. 1785, Chit. Conts., Bish.; Pearsall, 183 Mo. 386, 105 Am. St. 496-526, ext. n.

Suretyship and guaranty distinctions. Saint, 95 Ala. 362, 36 Am. St. 210, n. Notice in guaranty. Heyman, 77 Md. 162, 20 L. R. A. 257-264, ext. n.

Letters of credit. Lawrason v. Mason (1806), 3 Cranch, 492 (2 L. ed. 509), 2 Am. Lead. Cas. 335-361, 3 Kent, 84, 2 Rand. Com. Paper, 861.

All persons to whom they are addressed may advance upon it. Lawrason v. Mason; 3 Kent, 84.

Notice of things equally in knowledge of both plaintiff and defendant need not be given. Lex neminem, etc.; Lent.

Notice of acceptance necessary. 1 Chit. Conts. 14 (11th Am. ed.); Smith, 117, n.; Cooke: 321.

GUARDIAN: 1 Bouv. Dic. 910-914; 7 Mews' E. C. L. 1487-1502, *id.* 788-795. *See* INFANTS. *Cannot contract with ward.* Keech; 21 Cyc. 1-276.

GUEDEL v. P.: L.C. 74*a*.

GUILLE v. SWAN (1822), 19 Johns. 381, 10 Am. Dec. 234-237, Pattee, Cas. Torts, 8; Beale Dam. 62; Add. Torts, 422, 36 Am. St. 849, 2 Gr. Ev. 224, 622; Cool., Bish., Add., and Moak, Underh. Torts; Bro. Max. 208; Wood, Nuis. 6; Shear. & Redf. Neg. 58; 2 Pars. Conts. 194, 2 Whart. Ev. 1296, 1 Wat. Tres. 14, 20. Gilson.

Cited, § 348 Hughes' Conts.

Guille stated: A balloon escaped control, and was dragging the æronaut, who cried for help; to rescue him, persons broke into a garden and tramped down the vegetation. For this he was liable. *See* Fletcher; "Squib Case"; Vanderburg.

GUILTY KNOWLEDGE: Systems to prove. *See* SYSTEM. R. v. Wheatley.

GUITEAU'S CASE: This case suggests the detriments of the burden of proof when the *corpus delicti* is clear and admitted, and the defense is insanity. C. v. Macloon: 172.

GULICK v. WARD: L.C. 364.

HABEAS CORPUS: Lowery v. Howard (1885), 103 Ind. 440, 5 Crim. Rep. 273-292 (judgment may be assailed when), Bouv., And. Dic.; Bailey, Jurisdic. 310-408; Brown, Jurisdic. 355-394, 21 Cyc. 278-352; Tarble's Case; 5 Mews' E. C. L. 135-144 (crown office); Turney v. Barr (judgment must be subject to collateral attack). § 16, Hughes' Proc.

Coram non judice proceedings only subject to. Brown, Jurisdic. 105, 110; Weaver: 67, *Contra:* Koepke v. Hill (1901), 157 Ind. 172, 87 Am. St. 161-203, ext. n.; P. v. Mallary (1902), 195 Ill. 582, 88 Am. St. 212, n. (validity of statute cannot be tested upon); S. v. Knight (1894), 3 So. Dak. 509, 9 Am. Cr. Rep. 221-235 (contempt; relief from).

Infants: custody of. Tiede. Pol. Power.

"Due process of law"; Federal courts may protect. Royall.

Suspension of the writ. In re Boyle (1899), 6 Ida. 609, 96 Am. St. 286, 45 L. R. A.

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832-837 (courts will not interfere); Felts v. Murphy. *See* MARTIAL LAW.
Form of application. P. v. Turner: 252 (child in reform school), 2 Fost. Fed. Prac. 1317.
In R. v. Wheatley: 19, W. could have been released by *habeas corpus.* Ex parte Neet (1900), 157 Mo. 527, 80 Am. St. 638 (one imprisoned for playing base ball, which was no crime). Royall (jurisdiction of federal courts). May, 101 Me. 516, 7 L. R. A. (N. S.) 286.
Certiorari and habeas corpus; distinctions. S. v. Whitcher (1903), 117 Wis. 668, 98 Am. St. 968.
Relief where there is no jurisdiction. 124 U. S. 176. *Cited,* 198 U. S. 2. *See* CONCLUSION OF LAW.
HABITATION: Offenses against. McClain, C. L. 493-533. *See* SELF-DEFENSE.
HADDOCK v. HADDOCK (1906), 201 U. S. 562-633, 38 Chicago Legal News, 297-306. *Cited,* §§ 5, 13, 96, 98, 201, 267-268, Gr. & Rud.
The judgment of a sister state may be inquired into to see if its subject-matter is of such a character as should be enforced. If it appears that fundamental law has been disregarded then full faith and credit is not due it. Andrews; Weltmer.
This case reviews Pennoyer v. Neff, Borden v. Fitch, Andrews v. Andrews and Mills v. Duryee. *Melius petere fontes,* etc.
Courts are limited in the exercise of their jurisdiction by the laws constituting them, also by their pleadings, also the fundamental principles of justice. These are interpreted into the law. Church v. U. S.; Windsor; Montana (pleadings); *Expressio eorum.*
The study of procedure is a study of government. Andrews; Cruikshank; §§ 96, 201 (Collateral Attack), Gr. & Rud.
Fundamental law is imported by construction. C. v. Hess; Andrews; *Audi alteram partem; Regula pro lege si deficit lex;* Galbraith; *Lex non exacte.*
HADLEY v. BAXENDALE (1854), 9 Exch. 341, Sedgk. L. C. Dam. 126, 26 Law & Eq. 398, 190 U. S. 544: cases; Keener Sel. Conts. 1123, 5 Rul. Cas. 502-526, ext. n. (compensation for breach); 60 Am. Rep. 487, 149 U. S. 206, 96 R. R. 742.
Griffin v. Colver (1858), 16 N. Y. 489, 69 Am. Dec. 718-727, Sedgk. Lead. Cas. Dam. 269, 39 Fed. 446, 3 L. R. A. 592, Beale, Dam. 196; 3 Cyc. 49, 39 Fed. 440-447; 3 L. R. A. 587, 593; Suth. Dam., Shear. & Redf. Neg., Ans. Conts., 2 Gr. Ev. 256, 261, 1 Sedgk. Dam. 145-148, 170-200.
Gilson v. D., 36 Am. St. 806-861, ext. n. (*ex delicto* wrongs). See *In jure,* etc.; Sedgk. Dam. 144-200, 3 Pars. Conts. 183, Ans. 310, 2 Chit. 1325, 1 Add. 488, Hughes; 1 Add. Torts, 703, Suth. Dam. q. v. Western Tel. Co. v. Wilson (1893), 32 Fla. 527, 37 Am. St. 125, n. (failure to deliver a cipher telegram); 71 Tex. 571, 10 Am. St. 792 (telegram case); *Primrose v. Tel. Co.* (1894), 154 U. S. 1, 9 Am. R. R. & Corp. Rep. 722, 2 Gr. Ev. 256, 2 Benj. Sales, 1336, 3 Sm. L. C. 1818, 9th ed. (notes to Vicars v. Wilcox: excellent *resume* of remoteness); Guetzkow v. Andrews (1896), 92 Wis. 214, 53 Am. St. 909, n.; Bank v. Goos (1894), 39 Neb. 437, 23 L. R. A. 190, 3 Mews' E. C. L. 187, 189; 5 *id.* 287, 301 (What are natural consequences of wrongful act); Bro. Max. 226, 6 Encyc. Brit. 788, 5 A. & E. Encyc. 13, And. Dic. 250, Bigl. Fr. 507; §§ 184, 344, 345, Hughes' Proc. *Cited,* §§ 67, 68, Gr. & Rud.
Hadley v. Baxendale stated: Hadley broke a shaft of an engine, and this stopped his mill until he could get a new one cast. For this he delivered to B., a carrier, the broken shaft for a model, and informed B.'s clerk that the mill was stopped. However, B. delayed the delivery of the model, and caused loss, for which H. sued. But a recovery was refused because notice to the clerk was not sufficient: it should have been to one authorized to receive such notice. *One is presumed to intent the natural, direct and probable consequences of his act.* Scott v. Shepherd. §§ 343, 344, 345, Hughes' Proc.

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Smeed v. Foord (1859), 1 El. & Bl. 602 (102 E. C. L. R.), Sedgk. L. C. Dam. 275. *See* Hadley, 1 Add. Conts. 488, 2 Chit. 1325, 1326; 2 Gr. Ev. 266, 2 Sm. L. C. 574, 1 Suth. Dam. 56, 5 Mews' E. C. L. 287, 12 *id.* 584; Bro. Max. 227, 2 Add. Torts, 1384, Suth. Dam., Sedgk. Dam.; *Volenti;* §§ 345, 348, Hughes' Proc.
Smeed stated: S. was a wheat grower and wanted to thresh and haul his wheat from the field to market. F. was a seller of steam threshers, and with full knowledge of the situation (Hadley v. Baxendale), contracted with S. to furnish him a machine thresher to be used as desired by S. F. failed to deliver the machine in time, and S. proceeded to cut and haul and stack his wheat. The weather was unfavorable and the wheat had to be kiln-dried and was thus deteriorated. Delay was thus caused, and in the meantime the market price fell. For all these damages S. sued. *Held,* he could recover for all except the fall in price. One is presumed to intend the natural, direct and probable consequences of his acts. Hadley; Scott; *Nullus commodum capere.* S. P. in Hadley; and further, that one must take steps to prevent damages caused him, if he can, 2 Gr. Ev. 473; and such efforts constitute grounds for recoupment and may be allowed.
Duty not to enhance damages. Milwaukee, 87 Wis. 120, 41 Am. St. 33, n.; Wright, 110 N. Y. 237, 6 Am. St. 356, n., 1 L. R. A. 289.
One wrongfully discharged from performance of service to be rendered under an entire contract (Cutter) must obtain employment if possible. 2 Suth. Dam. 693.
Minimizing loss is a duty in all relations. Lawrence v. Porter (1894), 65 Fed. Rep. 62: cases, 26 L. R. A. 167, n. One must not invite his injury and then complain of it. *Volenti,* etc.; Cobbey, Replevin, 931; Gibbons v. Bente (1892), 51 Minn. 499, 22 L. R. A. 80. One must avert or lessen his damages, if he can, at slight effort or expense. Hamilton v. Feary (1894), 8 Ind. Ap. 615, 52 Am. St. 485, n.; Mather, 28 Iowa, 253; Huff. & Wood. Conts. 612; Davis v. Fish (1848), 1 G. Greene, 406, 409, 48 Am. Dec. 387; Miller, 7 Greenl. (Me.) 51, 20 Am. Dec. 341, Sedgk. L. C. Dam. 236; Loker v. Damon (1835), 17 Pick. 284; Sullivan, 37 Fla. 134, 53 Am. St. 239. *Cited,* §§ 67, 68, 296, Hughes' Proc.
Bennett v. Lockwood (1838), 20 Wend. (N. Y.) 223, 32 Am. Dec. 532, n.; Sedgk. Lead. Cas. Dam. 330, Beale, Cas.; Cob-

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bey, Replev. 920. §§ 344, 345, 348, Hughes' Proc.

Expenses caused by tortiously carrying away property may be recovered. S. P., Rice, 9 Allen, 478 (same for regaining custody of child); Scott v. S.; Hadley; *In jure non remota,* etc.

Or where property is capriciously withheld, as where an innkeeper tortiously holds baggage. Carhart v. Wainman (1902), 114 Ga. 632, 88 Am. St. 45, n. (damages are recoverable); Livermore Foundry Co., 105 Tenn. 187, 53 L. R. A. 482; Guetzkow, 92 Wis. 214, 52 L. R. A. 209-224, ext. n.

And likewise in ejectment suits. Re Laws, 1 Exch. 447: *Cited,* Bro. Max. 5. In replevin. Cobbey, Replevin, 920, 921. *Counsel fees; when recoverable. Sub* Merest; Bennett.

Loss of baggage; consequential injuries. Turner v. So. R. R., 75 S. C. 58, 7 L. R. A. (N. S.) 188 (strict rule against allowance).

Warrantors, indemnitors, sureties and guarantors are liable for expenses of litigation after notice and request to appear and take charge of the litigation. Hughes v. Græme, *sub* Merest; Lovejoy; Bigl. Fr. 506; 1 Sedgk. Dam. 229-241; 2 *id.* 772-806; Howard, L. R. 6 Exch. 43-45, 12 Rul. Cas. 841, 1 Chit. Conts. 746, 5 Mews' E. C. L. 302, 431; 11 *id.* 1318; Levitsky, 33 Cal. 299; 2 Sedgk. Dam. 772-805. *Commercial paper: same rule applies.* 2 Sedgk. Dam. 775.

One is presumed to intend the natural, direct and probable consequences of his act. "Squib Case"; Smeed.

Counsel fees as elements of damages. Howard; Hughes; Bracken v. Neill (1855), 15 Tex. 109; Stringfield v. Hirsch (1895), 94 Tenn. 425, 45 Am. St. 733, stating Oelrichs v. Spain (1872), 15 Wall. 211; Cook v. Chapman (1886), 41 N. J. Eq. 152; Winkler v. Roeder (1888), 23 Neb. 706, 8 Am. St. 155-161, n. *See* DAMAGES.

May be recovered as smart money in tort. Welch v. Durand, *sub* Merest.

Loss of profits as an element of damages for a breach of contract. Wells v. Nat'l Life Association (1900), 39 C. C. A. 476, 99 Fed. 222, 53 L. R. A. 33-112, ext. n. (for personal services).

Damages for tort as affected by loss of profits. Wallace v. Penn. R. R. (1900), 195 Pa. 127, 52 L. R. A. 33-36, ext. n.

What are natural consequences of wrongful act. 5 Mews' E. C. L. 263-305: cases; Am. Exp. Co. v. Jennings (1905), 86 Miss. 329, 109 Am. St. 708, n. (failure to deliver goods).

Hadley, like *Fletcher* and *Davies,* must be considered for each jurisdiction.

HAGTHORP v. HOOK (1829), 1 Gill & J. (Md.) 270; *stated,* 14 L. R. A. 491.

Administration of an estate is a necessity and cannot be avoided. Blood, 130 N. Y. 514, 15 L. R. A. 490, n. *Contra:* Taylor, 30 Vt. 238. *Cited,* § 158, Hughes' Proc.

The formalities of wills are mandatory. Bro. Max. 705; *Salus,* etc.; 73 O. 258, 112 Am. St. 723-735, ext. n.

HAHL v. SUGO (1901), 169 N. Y. 109, 62 N. E. 135, 88 Am. St. 539, 25 Am. Bar Ass'n Rep. (1902), p. 547. §§ 45, 51, Hughes' Proc.; § 143, Gr. & Rud.

Merger of causes of action. Under the code procedure all of the rights of the litigant, both legal and equitable, so far as they are consistent with one another and affect the same parties, can be tried in one action, and they merge in a single judgment.

Causes of action; recovering land; legal and equitable relief. When the plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of his house, such facts show but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. Perez v. Fernandez.

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Prayer is no part of the statement of a cause of action. The relief prayed for, or to which a plaintiff may be entitled, is no part of his cause of action. 89 Am. St. 541, n.; Strain, 30 S. C. 342, 14 Am. St. 905; White v. Lyon. See *Ad damnum.*

The demand in the complaint is no part of the action and does not give it character. The facts alleged do this, and plaintiff is entitled to such relief as they warrant. Strain. *Contra:* Russell (Colo.).

The failure of a plaintiff to state facts to show that he is entitled to equitable relief is no excuse for the commencement of an independent action upon the single cause involved in the first action. *See* SPLITTING CAUSES OF ACTION.

Equitable relief cannot be sought in a subsequent equitable action to aid an execution upon a judgment already obtained.

Hahl is a case of questionable construction, and deserves to be well considered. A judgment in ejectment had been obtained and an execution issued and returned, because it could not be enforced by the sheriff against an encroaching wall. The remedy for this being a mandatory injunction, a second suit was instituted for an ancillary or auxiliary purpose. Of this it was instructively observed: "That the second action in equity would have been maintainable under the old procedure, or under any system where law and equity are administered by different tribunals, is beyond question, and the encroaching wall, which so far as the courts are concerned still wrongfully stands in the city of Buffalo, is striking evidence that the intimate connection between adjective and substantive law has not yet been severed." Professor H. S. Redfield, in 25 Am. Bar Ass'n Rep. 548. *See* ADJECTIVE LAW.

If the doctrine of election of remedies and merger of causes of action and of auxiliary remedies is so much more technically and destructively strict under codes than other systems, that fact should be well defined. But why should such strict doctrines be construed into a code? Is not the rule under the old systems sufficiently strict in reason and for protection? Countless decisions hold that the code was designed to abrogate the strictness, severity and the absurdities and refinements of the old systems. *See* CODES.

HAHN v. KELLY (1868), 34 Cal. 391, 94 Am. Dec. 742-770; 1 Ell. Ev. *Cited,* §§ 13, 31, 85, Hughes' Proc.; §§ 93, 104, 108, 115, 118, 119, 241, Gr. & Rud.

The mandatory record; of what it consists. Hahn (instructive decision as to this).

Presumption of regularity. Omnia præsumuntur rite. Limitations; province of. Galloway (Tex.); Franklin Lodge (Ill.); Harrow.

"According to the course of the common law"; meaning of this phrase. See 94 Am. Dec., pp. 752-754; Galpin: 63 (quoting and discussing Hahn).

From Hahn we quote:

"Some words are used to express ideas, and

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others to ornament them. The more we turn this expression over and examine it by the light of reason, for the purpose of determining to what use it has been put, the more we are inclined to the opinion that it has been used merely from force of habit, or namely, for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but it leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed, its use was harmless, for there was then no mode of procedure except such as the common law prescribed; but its continued use, where the modes of the common law have been superseded, is mischievous."

HAKE v. STRUBEL (1897), 121 Ill. 321. *Signing exceptions record—the Statutory Record—must be as ordered.* The order must be made in term time. This order is the exercise of statutory power and is strictly construed, like service by publication. Pennoyer: 58; Galpin: 63; Crepps: 113; Harris v. S.: 158. *Contra* cases are found in Colorado. Hume: cases. *Cited,* § 13, Hughes' Proc.

HALE v. HENKEL (1906), 201 U. S. 43-89. *S. P. Nelson v. U. S. Id.* 92-116.

Nemo tenetur seipsum accusare: Immunity of witnesses; history and limitations of the right. It can be claimed by the witness for himself only. If one system of courts grants immunity and thus extorts the testimony, then other systems may use the evidence thus obtained for conviction. To illustrate: If federal courts grant immunity and then extort answers, then state courts may properly admit such testimony to secure a conviction in the state courts. It is sufficient for admissibility in federal courts if immunity is granted therein. *Counselman:* 178; *Brown v. Walker; Adams v. New York; Boyd v. U. S.* and *Broom's Maxims* are cited and discussed.

"The theory of our criminal proceeding, like that of Great Britain, is accusatory, not inquisitorial." P. 49. See *De non apparentibus; Frustra probatur,* etc.; BURDEN OF PROOF.

Grand jury: limitations of its powers. It may proceed inquisitorially. History shows that some courts respect the fundamental rights of witnesses and parties, that others extort evidence upon which they proceed like the Star Chamber proceedings, while still others, and the most barbarous type, proceed without any evidence at all.

HALE v. S. (1896), 55 Ohio, 210, 60 Am. St. 691, 36 L. R. A. 254-260, n.; *cited,* §§ 293, 294, Gr. & Rud. Contempts; courts have inherent power to punish; *Expressio eorum.* After case is ended. 68 L. R. A. 251-264, ext. n.; 106 Am. St. 916-924; 99 Am. St. 624-676, ext. n. *See* CONTEMPTS.

HALEY v. ELLIOT (Colo.). See Breeze v. Haley.

HALLETT v. WYLIE: L.C. 308*d*.

HALL v. CORCORAN (Illegal contracts; *In pari,* etc.): L.C. 369.

HALL v. HENDERSON (1899), 126 Ala. 449, 28 So. 531, 85 Am. St. 53, n.

Estoppel in pais must be pleaded, and the facts supporting—constituting it—clearly made out by the person relying upon it. It can never arise from ambiguous facts, and must be established by such as are unequivocal and not susceptible of two constructions (*Verba fortius*). It cannot rest on mere inference or argument, but

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must be a precise affirmation of that which makes it. The facts constituting a cause of action or defense must clearly appear after there is applied: every presumption is against a pleader. *Verba fortius;* Dovaston: 217; J'Anson: 91; De Ruiter, 28 Ind. Ap. 9, 91 Am. St. 107. *See* ESTOPPEL. *Cited,* § 22, Hughes' Proc.

HALL v. MARSTON (1822), 17 Mass. 575. *Only parties to a deed can sue upon it at common law. See* Hendrick; Cooch; DEEDS. *Cited,* § 129, Hughes' Conts.

HAMILTON v. WHITRIDGE: L.C. 280.

HAMMACK v. WHITE: L.C. 208.

HAMMOND v. WOODMAN (1856), 41 Me. 177, 66 Am. Dec. 219-246, ext. n. Expert testimony; its weight and effect. *See* EXPERTS; *Cuilibet sua arte,* etc.

HAND v. WADDELL: L.C. 295.

HANDWRITING: Hanley: 204; 42 L. R. A. 771-774; Jones, Ev.; 6 Mews' E. C. L. 815; McClain, C. L. 761, 806; 64 L. R. A. 303-320 (limitations of); 1 Wigm. Ev. 693-709; 3 *id.* 1991-2027; 65 L. R. A. 151 (procedure).

Expert to prove; who is. S. v. McBride, 30 Utah, 432, 7 L. R. A. (N. S.) 560, n. Example for comparison must be admittedly genuine, is the rule in federal courts. *See* University, 71 N. H. 163, 62 L. R. A. 817-874, ext. n. Bouv.; And. Dic.; Bonnell: 185.

HANEY v. P. (1888), 12 Colo. 346. Denials upon information and belief must follow code formula. Humphreys: 38.

HANFORD v. DAVIES: L.C. 86.

HANLEY v. GANDY: L.C. 204.

HANNAH v. CHASE: L.C. 128.

HANNEM (OR HANNEN) v. PENCE (1889), 40 Minn. 127, 12 Am. St. 717. *Denials are overcome by admissions or justification pleas.* Dickson: 34; Hayes v. Williams; Crater v. McCormick. *Verba generalia.*

HANSON v. KREHBIEL (1904), 68 Kan. 670, 75 P. 1041, 104 Am. St. 422, n.: cases. *Cited,* §§ 140, 268, 296, Gr. & Rud.

Legislatures cannot give immunity for the commission of torts. Taylor v. Porter (property): 219*a*; Louisville Co. (nuisance).

Statutes void in part are void in toto. James: 233.

HARD CASE: Hard cases will arise. *Ad ea quæ,* etc.; SPLITTING OF CAUSES; notes to Cutter; Austin R. R.; § 167, Hughes' Proc.

HARDEN v. ATCHISON R. R. (1876), 4 Neb. 521, 523.

Denials must be certain. Dickson: 34.

HARDIGAN, IN RE (1884), 57 Vt. 100, 5 Am. Cr. R. 269.

Return of officer may be contradicted in habeas corpus proceedings. Hauswirth: 51.

Justice rejecting evidence it was his duty to hear, renders his proceedings coram non judice and void. Windsor: 1. They are subject to review upon *habeas corpus.*

Officers return that relator "had been intoxicated, and had disturbed the public peace," is not conclusive, and is overcome by facts alleged in the relator's complaint. Non potest adduci, etc.

HARDING v. GLYN (OR GLYNN) (1739), 1 Atk. 469, 5 Ves. Jr. 501, 26 Eng. Reprint 299, 2 Lead. Eq. Cas. 1833-1866, ext. n., 6 Gray, Cas. Prop. 380; Bish. Eq.; Pom. Eq., Perry, Trusts; Mews' E. C. L.

Harding stated: H., by will, gave all his personal property to his wife, "desiring" her, before her death, to give the same

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to such of his relations as she thought most deserving. *Held*, that the word "desiring" raised a trust in the next of kin of H.; that there was a precatory trust. 1 Beach, Eq. 165; Phillips v. Phillips (1889), 112 N. Y. 197, 8 Am. St. 737, n., 4 Kent, 305; Orth v. Orth (1896), 145 Ind. 184, 57 Am. St. 185-203, n. *See* Jackson v. Phillips; Brown v. Higgs (1799-1801), 4 Vesey, 709, 5 *id.* 495, 8 *id.* 561, 31 Eng. Reprint, 366, 700; 32 *id.* 773; 4 R. R. 323; Mews' E. C. L.

HARDSHIP. When relieved by construction. Suth. Stat. 324. *Lex non.*

HARDY v. SUMMERS (1838), 10 Gill & J. (Md.) 316, 32 Am. Dec. 167.

Motions to dissolve injunctions in vacation are limited to positive denials of the equities; pleas of new matter and affirmative matter cannot be heard. Blair: 170.

A plea of res adjudicata is a plea of new matter. Hardy v. Summers. *Contra:* Breeze v. Haley (court usurped jurisdiction, and tried the plea not passed upon by the trial court). *See* Blair v. Reading.

HARGIS v. MORSE (1871), 7 Kan. 415. *Cited*, § 125, Gr. & Rud.

HARKNESS v. HYDE: L.C. 152.

HARPER v. CITY INSURANCE CO.: L.C. 218.

HARRIMAN v. STOWE (1874), 57 Mo. 93, 2 Thomp. Neg. 1057-1062, n., 1 Cent. L. J. 400, Pattee, Cas. 280; Mech. Ag., Whart., Huffc., Tiff., Reinhard; Bish. Torts 627, Whart. Neg. 535, 3 Colo. Ap. 95, 48 Am. St. 927 (liability of servant to third person for negligence), 3 Suth. Dam. 800: cases; Greenberg, 90 Wis. 225, 48 Am. St. 911-992, ext. n., 28 L. R. A. 439.

Cited, §§ 296, 303, Gr. & Rud.

Agent is liable to third persons. 3 Suth. Dam. 800: cases; Ellis, 76 Mich. 237, 15 Am. St. 308 (non-feasance of husband acting for his wife); Steinhauser, 127 Mo. 541 (wife acting for husband). And for dangerous premises he lets for his principal. Baird, 132 Ill. 16, 22 Am. St. 504, 7 L. R. A. 128, Mech. Ag. 572, Whart. 535. Directors of a corporation are liable for its torts. Cameron, 22 Mont. 312, 44 L. R. A. 508, n. A contractor is not liable after acceptance of his work. First Presby., 163 Pa. 561, 26 L. R. A. 504, n., 43 Am. St. 808, n. Servants must indemnify master if he is made liable for servant's acts. Sto. Ag. 217*c*, Whart. 253, 3 Suth. Dam. 800; 1 Suth. Dam. 180 (recoupment); Add. Torts, 8; R. R. v. Greer (1899), 104 Tenn. 242 (joint trespassers). Set off, rights to, against a servant. Glennon, 140 Pa. 594, 12 L. R. A. 321, n.; Reinh. Ag. 487; R. R. v. Greer: 283.

HARRISBURG, THE (1886), 119 U. S. 197, 214, *stating* Baker v. Bolton; Carey v. Berkshire R. R.; *Actio personalis*, etc.

HARRISON v. BUSH (1855), 5 El. & Bl. 344 (85 E. C. L. R.), 32 Eng. L. & Eq., 13 Ames, Cas. Torts, Bro. Max. 319, Mews' E. C. L.

Cited, §§ 19, 103, Hughes' Proc.; §§ 63, 152, 296, 313, Gr. & Rud.

Defamation; bona fide interest. One having an interest may communicate false and defamatory statements to others in interest, if only it is done *bona fide*. Harrison; *McAllister v. Detroit Press Co.* (1889), 76 Mich. 338, 15 Am. St. 318-369, ext. n.; Baysett, 49 La. Ann. 904, 62 Am. St. 675, n.; McGaw, 184 Pa. 108, 63 Am. St. 786, n., Tiede. Pol. Power, 17*c*; Belknap, 83 Mich. 583, 21 Am. St. 622, n., 11 L. R. A. 72; *Eum qui nocentem infamat*, etc.; Hebner v. Great Northern

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R. R. (1899), 78 Minn. 289, 79 Am. St. 387, n., 65 L. R. A. 980.

Here is an obligation imposed by the state for the public welfare. Salus populi suprema lex. What the law commands, it will not punish. Smith v. Burrus. An able exposition of this principle was made by Paul before Agrippa.

Privileged communications. Ross v. Ward (1901), 14 S. Dak. 240, 86 Am. St. 746 n.; Holmes, 121 Ga. 241, 104 Am. St. 103-151, ext. n.; C. v. Clap; Wabash R. R., 162 Ind. 102, 4 L. R. A. (N. S.) 1091-1126, ext. n. (defamation of servant).

HARRIS v. BROOKS: L.C. 386.

HARRIS v. MUSKINGUM: L.C. 229.

HARRIS v. S.: L.C. 158.

HARRIS v. TYSON: L.C. 380.

HARROW v. GROGAN (1906), 219 Ill. 288. *Cited* §§ 96, 108, 123, 124, 124*b*, 125, Gr. & Rud.

Presumption of regularity—continuity. A judgment and its foundation must be introduced in evidence to prove a title to property. If the foundation is insufficient to support the judgment, omitted matter will be supplied by liberal construction if not incompatible with the record introduced, *e. g.*, if the service of process shown by the record is insufficient but sufficient time elapsed before the trial of the case to have been made further and sufficient service, this will be presumed to have been made in order to sustain the judgment upon collateral attack.

The presumption of regularity will be conclusively indulged in unless what it imports is incompatible with other parts of the record. Forest v. Fey (1905), 218 Ill. 165, 109 Am. St. 249. *See* Galloway; *notes* Hahn v. Kelly, 94 Am. Dec. 794. It will be presumed that further service of process was made and that evidence of this was not made of record in a superior *court of record* exercising not only powers according to the course of the common law but exercising strict statutory powers as well. It will be presumed that all was not made of record that should have been. *Cf.* Davenport: 2*f*.

The limits of the presumption of regularity are to every extent unless *affirmative* matter in the record is contradicted. Curative matter is imported by construction and for its force it will be presumed that the clerk did not do his duty. § 96, Gr. & Rud.

A plaintiff is not charged with the duty of making and conserving the files to show authority for his claim or demand. Cf. McArthur v. Howett.

In Illinois the mandatory record is required as in other states. Clem: 2*c*: cases. What it affirmatively shows is conclusive and binds the court. §§ 60-61, 118, Gr. & Rud.; Fish v. Cleland: 12*c*.

But the *Harrow Case* is opposed to the maxims: *Expressio unius*, etc., *Verba fortius*, etc., *De non apparentibus et non existentibus eadem est ratio* and their corollaries. It presumes there was *judicially* considered what was not *juridically* presented; for what the clerk did not make of record and present

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was not *juridically* before the court. §§ 61, 118, 160-163, Gr. & Rud.

It is opposed to the record rule: *"What ought to be of record must be proved by record and by the right record."* §§ 56-61, 104, Gr. & Rud. Also the division of state power, for it ignores the position of the clerk and his duty to make and keep a record of jurisdictional facts. It presumes he did not do it.

It requires the foundation of the judgment for this purpose only, namely, to speak as far as it *affirmatively* shows in behalf of one resisting an estoppel or condemnation proceedings, a sequestration or a title founded on a judgment. It does not extend his defence by presumptions of regularity and continuity but on the contrary extends the rights of him who would apply the estoppel or take the property.

It involves first rules of *res adjudicata*, and especially these: the proceedings must *affirmatively* appear from the record to be *coram judice* and estoppels are odious.

It makes the objection upon collateral attack less than the same objection upon motion in arrest of judgment. It thus introduces varying rules of construction and incompatible rules with those of *res adjudicata*, a leading one of which is, the proceedings must be *coram judice*. In tests of estoppel of record the record is conceived and designed to speak, and what it should show and does not, is presumed not to exist. *De non apparentibus et non existentibus eadem est ratio.*

It involves the rationale of the presumption of regularity and continuity in this way, that the record is not regular. It does not show all that the court assumes took place; it does not show all it should and might probably have shown and is generally required to show. Omission from the mandatory record of such matter is destructive of the conserving principles of procedure and of that record upon which they depend. Such omissions are fatal to the presumption of regularity and continuity. In such cases the burden of proof shifts. Note, 28 Am. St. 21; Swearengen v. Gulick (1873), 67 Ill. 208; *Omnia præsumuntur rite;* Hahn v. Kelly (Cal.); Cooper v. Reynolds; Crepps v. Durden.

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It cites *Kenney v. Greer* (1851), 13 Ill. 432-454, discussing superior and inferior courts in a confused and bewildering manner. This case affords that befogging discussion in the notes to *Crepps v. Durden* (Smith's Leading Cases). It cites *Kempe v. Kennedy*, U. S., *Bloom v. Burdick*, *Borden v. Fitch*, N. Y.; also *Benefield v. Albert* (1890), 132 Ill. 665; *Wallace v. Cox* (1874), 71 Ill. 548.

In notes to a later edition of the *Kenney Case*, *Galpin v. Page* (18 Wall.) is cited. It is difficult to see how it supports the Illinois cases, which construe the mandatory record strictly and against the conserving principles of procedure. To uphold a judgment on collateral attack the record is construed with transcendent liberality to apply an estoppel. Bowman v. P.

In Illinois the mandatory record is liberally construed to defeat him who asks respect for the conserving principles and the record upon which they depend and like the statutory record which is strictly construed to defeat a review of the record for material error relating to those principles or other matters presented.

A consideration of the conserving principles of procedure and of the above cases will disclose the importance of construction, also the truth in the maxim, *Cujus est instituere ejus est abrogare.*

In Illinois the functions of the mandatory record are very uncertain. Only in some code states can be found more conflicting and irreconcilable views. *Munday v. Vail:* cases.

One examining a title to property passing upon judicial or execution sale could not determine what conclusion would be juridically reached where the ends and purposes of the mandatory record are beclouded by interminable discussions. To illustrate this proposition the cases above cited are relied upon. They are inconsistent with grounds and rudiments of law.

Division of state power must be respected. Dennett; Hall v. Marks (1864), 34 Ill. 358.

Judges in Illinois may make judicial recitals in their judgments that dispense with records that clerks should make and conserve.

A leading purpose of government was to protect property, its acquisition, enjoyment and devolution. Remove this purpose and it is debatable if government is worth what it costs. It is the duty of govern-

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ment to prescribe, establish, maintain and vindicate laws that support and show titles to property. This duty is discernible in declarations of purposes for which government is formed; these are found in preambles and bills of rights. All history shows that where title to property is insecure there is bad government; such regions are lands of perjury, assassinations, feuds, conspiracies and official plots to rob by the forms of the law. Where government fails to do its duty a crop of bitter fruits is sown, which are sure to bring disaster. These observations are made to arouse interest and attention to the importance of the next observation.

Whether or not the divestiture and giving of title by means of judicial or execution sale rest upon fixed and stable requirements which emanate from nothing more than basic conceptions of judicial procedure is a leading proposition. Its argument and acceptance depend upon what is involved in the conserving principles of procedure already enumerated and defined, and particularly the fourteenth, namely, "what ought to be of record must be proved by record and by the right record." This involves constructive notice, presumptions of regularity, of continuity and limits of liberal construction. *Harrow v. Grogan.* Accordingly appears how pleading and evidence pervade the profoundest principles, ends and purposes of government. Thus appears the mystic influence of the due administration of the laws.

Starting from these propositions, suppose representative lawyers of Illinois and its surrounding jurisdictions of lakes and states were in conference as to what constituted a good record title to property in those various jurisdictions and the respective functions of the mandatory and statutory records in the discharge of governmental functions. Decisions from these seven jurisdictions, or eight if we include the federal, show that great confusion would be introduced. The condition would be like the building of Babel. It would be a climax of absurdities, contradiction and incompatibility of view. Vainly would the lawyer of Illinois declare his courts were close and intelli-

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gent followers of Blackstone and of Chitty, and that these illumined works lit up and safely paved the way over which they trod. The surrounding jurisdictions would not accept those declarations in the light of two generations of stumbles and contradictions over the principles in *Harrow v. Grogan.* This involves what Justices Field and Miller contended over in the cases of *Windsor v. McVeigh* and *Cooper v. Reynolds.* From all it could be gathered that what was lacking was a comprehension of the principles already mentioned, which involves this proposition among others, namely, what is not *juridically* presented cannot be *judicially* considered. This principle is better understood in Italy, Spain, France, Switzerland, Germany, England, Scotland and Ireland than in Illinois and its adjacent jurisdictions. The old rules in a new verbiage have misled jurists and statesmen in the western hemisphere, who have no time or patience to consider fundamental maxims—the condensed good sense of nations. Indeed, they are taught and believe that maxims are no longer the law. Now, do they get needful instruction from the great authorities is the question. To answer this, one has only to consider how Illinois and its surrounding and interlacing jurisdictions view each other.

They widely vary as to the office and functions of the mandatory and the statutory records. In Illinois fifty-three cases were disposed of upon technical grounds relating to those records. *Planing Mill Co. v. Chicago: 2d.*

Some of the Illinois cases hold that the forms of the law are a part of the law. That the conserving principles will first be sought and vindicated before the rights of the parties will be considered. *Planing Mill Co.: 2d; Austin R. R. v. Cluck.* That what is not *juridically* presented cannot be *judicially* considered. But from this principle great departures can be pointed out, for instance, that variances can be waived if not objected to, also that pleas, answers and replications can be waived.

Without more, enough is suggested to show that grounds for furious contention might arise,

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which could not be safely settled by the thousands of books those jurisdictions offer their people as a guidance to obedience to law. *Res est misera ubi jus est vagum et incertum.* Preface, DATUM POSTS; Dovaston: 217.

Service of process is prima facie presumed from judicial recitals in records of courts of general jurisdiction. Mathews v. Hoff (1885), 113 Ill. 90.

If the record shows insufficient service of process this condition is not presumed to continue. The presumption of continuity will not prevail over conclusions of law or general statements written by the judge. Mathews v. Hoff; Harrow.

The clerk should make the record, but if he fails the judge may make one for him. Mathews, 113 Ill. 91.

It is presumed that clerks do their duty faithfully, intelligently and promptly, according to law. Palmer v. Emery (1900), 91 Ill. Ap. 207. *See* Harrow; *Omnia præsumuntur.*

HARSHEY v. BLACKMARR (1866), 20 Ia. 161, 89 Am. Dec. 520-535 (judgments may be set aside for fraud); Needham: 261: cases; Ferguson: 264: cases; Hauswirth: 51; Marine Ins. Co.; Hayne Appeal 337-342; Bailey, Jurisdic.; *Ex dolo malo,* etc.; Weeks, Atty's, 399-429, Van Fleet, Coll. Att., p. 437, Mech. Ag. 809, 810, Encyc. Pl. & Pr. 686, 2 Co.o. 61, Cool. Torts, Ror. Interstate Law, 148, 149, 3 Pom. Eq. 1364, 123 N. Y. 441, 20 Am. St. 773, 1 Dev. Deeds, 462, 1 Wh. Ev. 796, 808, Freem. Judg. 128, 499, 1 Black, Judg. 374, n., 34 Am. St. 520, 21 L. R. A. 848-861, ext. n.; Kleber on Void Judicial and Execution Sales. §§ 52, 118, 147, Hughes' Proc.

Judgments founded on the unauthorized appearance of an attorney may be set aside. Harshey; Corbitt, 95 Mich. 581, 35 Am. St. 586, n.; Williams, 112 N. C. 424, 21 L. R. A. 848; Hollinger, 138 Ind. 363, 46 Am. St. 402, n., 24 L. R. A. 46; Ferguson: 264: cases.

Cited, § 28, Hughes' Conts.

HARVEY v. BRYDGES (1845), 14 M. & W. 437-443, 3 Dowl. & L. 35, 69 R. R. 718. *Verba fortius.* § 215, Hughes' Proc.

The owner of realty may enter on and take possession of his property if he can without causing a breach of the public peace. Taylor v. Cole; *Salus populi suprema lex.*

HARVEY v. RICHARDS: L.C. 32.

HARVEY v. TYLER: L.C. 123.

HARVEY v. VAN DE MARK. Stenographic reports are not proper bills of exceptions. R. R. v. Stewart: 290*a*; § 12, Hughes' Proc.

HASKEL v. HASKEL: L.C. 101.

HASTINGS v. LUSK: L. C. 160.

HAUPT v. SIMINGTON (1903), 27 Mont. 480, 94 Am. St. 839.

Collateral attack must be tried and determined upon the mandatory record alone. Windsor: 1; McAllister: 3; Planing Mill Co.: 2*d*.

HAUSWIRTH v. SULLIVAN: L.C. 51.

HAWAII v. MANCHIKI (1903), 190 U. S. 197-249; *cited,* § 136, Gr. & Rud.; 12 Am. Cr. Rep. 465. See *Verba intentione.*

HAWKERS AND PEDDLERS. 21 Cyc. 364-378.

HAWKINS v. C.: *See* Semayne's Case.

HAYS v. WILLIAMS (1892), 17 Colo. 464, 471. Inconsistent defenses. *See* also Dickson v. Cole; Seattle Bk. v. Jones; Hannem v. Pence; Graver: 103.

HAY v. COHOES CO. (1849), 2 N. Y. 150, 1 Thomp. Neg. 72-115, ext. n., 51 Am. Dec. 279, Burd. Cas., Bigl. L. C. 499; Mathews, 121 Mo. 298, 9 Am. R. R. & Corp. Rep. 141, 460 Busw. Pers. Inj. 92, Suth. Dam., Sedgk. Dam., Cool. Torts, Bish., Moak, Underh.; Wat. Tres.; Shear. & Redf. Neg.; Sto. Ag.; Cool. Const. Lim.; 2 Wash. R. P.; Dill. Munic. Corp.; Beach.

Hay stated: Negligence; blasting rock. The company, while digging on its own land, used high explosives to blast rock, and this was hurled upon Hay's premises, for which he successfully sued, and regardless of the defense of due care.

Sic utere, etc.; Panton v. Holland. *See* Gilson v. Delaware Canal Co.: cases; Gates v. Latta (1895), 117 N. C. 189, 53 Am. St. 584, n.; Blackwell v. Lynchburgh R. R. (1892), 111 N. C. 151, 32 Am. St. 786; Klepsch, 4 Wash. 436, 31 Am. St. 936, n.; 76 Am. St. 421 (shooting cases); Sullivan, 161 N. Y. 290, 47 L. R. A. 716: cases (reviews Hay); Fletcher.

Tremain v. Cohoes Co. (1849), 2 N. Y. 163, 1 Thomp. Neg. 76, 51 Am. Dec. 284, 17 Am. Rep. 262, Wood, Nuis. 28, Bigl. L. C. Torts, Cool. Const. Lim. 659, Cool. Torts, 292, Shear. & Redf. Neg. 497; Fletcher; Nichols; Squib Case.

Booth v. Rome, etc. R. R. (1893), 140 N. Y. 267, 37 Am. St. 552, 24 L. R. A. 105, 9 Am. R. R. & Corp. Rep. 92-102, n., 76 Am. St. 421; Benner v. At. Dredging Co. (1892), 134 N. Y. 156, 30 Am. St. 649, 17 L. R. A. 220-224, n.; Wadsworth v. Marshall (1896), 88 Me. 263, 32 L. R. A. 588 (frightening horses); Bailey v. Mayor, *sub* Hill v. Boston.

Wetherbee v. Partridge (1900), 175 Mass. 185, 78 Am. St. 486. *Contra* cases cited to the point that an employer is liable with an independent contractor. All are liable where the operations are *per se* dangerous. *See* Gilson Case; Fletcher v. Rylands; Scott v. Shepherd—"Squib Case"; Hadley v. Baxendale.

Limitations of power to contract for immunity. Hollister v. Nowlen; *Pacta,* etc.; *Pactis,* etc. § 18, Hughes' Conts.

Respondeat superior; independent contractor. Hilliard v. Richardson; 76 Am. St. 375-428 (able *resume*): McManus v. Crickett: cases, *post;* Craker v. Chicago & N. W. R. R.

HAZLETON v. SHECKELLS (1906), 202 U. S. 71-79.

Lobbying contracts. In pari; S. P. in Trist v. Child: 214; Tool Co. v. Norris.

Every part of the consideration for a contract goes equally to the whole promise, and if any part of it is contrary to public policy the whole promise falls. *See* Pigot's Case.

HEALTH: Protection of. McClain, C. L. 30-33. Injuries to, a nuisance. McClain, C. L. 1169-1183. Injunctions to protect. Hamilton v. W.; Bouv. Dic.; Mews' E. C. L.; 21 Cyc. 382-407.

Legislation to protect by abating nuisances. Fertilizing, 97 U. S. 659, Myer, Rights, 577.

Taxation may be for. S. v. Davidson, 114 Wis. 563-582. *See* Loan Association; POLICE POWER; Barbier; Millett v. P.

HEALTH BOARDS: Miller v. Horton (nuisance); Blue, *sub* POLICE POWER.

HEARSAY EVIDENCE: *Exceptions to rule.* Doe d.: 213. *See* L.C. 213-213*g*; 16 Cyc. 1192-1261; 1 Ell. Ev. 314-331. § 272, Gr. & Rud.

Incompetent, and need not be excepted to. Shutte: 291. *See* Gillett, Ind. Ev. 223-235; 1 Gr. Ev. 98-126; 2 Wigm. Ev. 1395-1418: cases; 3 *id.* 1630-1810.

Res inter alios acta, etc.; Doe d.; Bouv.: And. Dic.; 1 Ell. Ev. 159.

The test of hearsay evidence depends on the allegations and denials of the mandatory record, and not on waiver, estoppel, participation, consent. Consider what is suggested under Munday, Crain and Adams v. Gill.

HEAT OF BLOOD: Reducing homicide to manslaughter. McClain, C. L. 337-346; Holmes.

HEATON v. HODGES (1836), 14 Me. 66, 30 Am. Dec. 731-742, ext. n. *Cited,* § 261, Hughes' Proc.

Construction; description of land. Survey actually made governs the location of land granted with reference to a plat, if such survey can be ascertained. Heaton v. Hodges. If a parcel of land is described as being subdivision No. 25, as designated on a map of a block of land on file, and is also described by metes and bounds, and there is a conflict between the two descriptions, the former prevails. Masterson v. Munro (1895), 105 Cal. 431, 45 Am. St. 57.

Parts of description which are most certain to prevail. Notes, 30 Am. Dec. 735; *Falsa demonstratio,* etc.

Particular description preferred to general, when. Notes, 30 Am. Dec. 735; *Verba generalia restringuntur.* But see Lake Erie R., 155 Ill. 514, 46 Am. St. 355, 28 L. R. A. 612.

False particulars rejected. Falsa demonstratio non nocet. Notes, 30 Am. Dec. 736.

Monuments preferred to courses and distances. *Certum est quod,* etc.; notes, 30 Am. Dec. 737; *Leges non verbis,* etc.; *Nil facit error nominis,* etc.; 2 Wharf. Conts. 633; *Res ipsa loquitur.*

What the parties did under a deed indicates their intention. This is a practical construction. See *Contemporanea,* etc.; PRACTICAL CONSTRUCTION; 2 Dev. Deeds, 840.

Rule that monuments control is not inflexible. *Falsa demonstratio non nocet;* notes, 30 Am. Dec. 740; Security, 193 U. S. 163.

Survey plan of previous conveyance, referred to in deed, incorporates it to the extent it is referred to. Notes, 30 Am. Dec. 741; *Verba relata.*

Description by words preferred to figures. Notes, 30 Am. Dec. 742. *See* AMBIGUITY.

Lines premused straight. Notes, 30 Am. Dec. 742. "Subdivision No. 25" controls metes and bounds. 46 Am. St. 367, n.

Construction of deeds same as other instruments. 1 Beach, Conts. 735; § 33, Hughes' Conts. Smith. 558; 14 Rul. Cas. 577-833. *See* Wilkins: cases.

Boundaries of land; riparian rights to accretion. Sweringen v. St. Louis (1902), 185 U. S. 38; Live Stock Co. v. Springer (1902), 185 U. S. 47.

Principles of construction. 2 Dev. Deeds, 835-880; Wilkins.

HEAVEN v. PENDER (1883), L. R. 11 Q. B. Div. 503, 46 L. R. A. 33-122, ext. n., reviewing Heaven and cognate cases, such as Langridge and Hadley; 10 Mews' E. C. L. 43, 61, 71, 75, 102, 120, 12 *id.* 487. Doctrine of Heaven is quoted with approval in Gibson, 143 Ill. 182, 36 Am.

Heaven.—

St. 376, 17 L. R. A. 588, 32 N. E. 182, 36 Am. St. 817; Ewart, Estop. 42; 92 Am. St. 552-556; notes to Fletcher, Smith, Ld. Cas. (11th ed.). *Cited:* §§ 296, 313, Gr. & Rud.

Agency; negligence; remoteness. Right of a servant to recover from third persons for negligence. Langridge; Thomas; Winterbottom; Van Winkle, 52 N. J. L. 246. *Cited,* §§ 343, 348, Hughes' Proc.

HEGARTY v. SHINE (1878), (Ir. Ct. App.) 14 Cox, C. C. 124, also 145; 7 Cent. L. J. 291, 8 *id.* 111, 112, Ames, Cas. Torts, 30; *cited,* 2 Bish. C. L. 726, Bish. Torts, 192; Cool. 510-514; *stated,* R. v. Clarence (1888), 16 Cox, C. C. 511, 4 Mews' E. C. L. 1471; Hughes' Conts. *Cited,* §§ 40, 52, 293, 294, 304, 307, Gr. & Rud.

Consent to illicit intercourse avoids the woman's right to a remedy for a venereal disease imparted, although she was ignorant of the man's infection. *Volenti,* etc. Deeds v. Strode (1898), 6 Idaho, 317, 55 Pac. 656, 96 Am. St. 263. But men may fight by consent and have a remedy over for damages. S. v. Beck. Very strict rules apply to women. Pollard.

Consent to intercourse as an element of condonement vitiated by ignorance. R. v. Case, 4 Cox, 220; R. v. Clarence; R. v. Sweenie (1858), 8 Cox, C. C. 223 (instructive case as to fraud, deception, force and resistance in rape and seduction cases); Hood.

A husband is not guilty of an assault upon his wife, although he knows he has an infectious venereal disease, and conceals that fact from his wife and induces her to submit to intercourse. R. v. Clarence.

Consent to injury, when no defense. Bird v. Holbrook; R. v. Sinclair (1867), 13 Cox, C. C. 28 (communicating venereal disease to a girl ignorant of it); 4 Mews' E. C. L. 1471; 14 *id.* 227.

Crimes; fights by agreement. One injured in a fight by agreement may nevertheless recover for injuries received. Shay v. Thompson (1884), 59 Wis. 540, 48 Am. Rep. 538, n., Cool. Torts, 162-164, Bigl. L. C. 232, n., Ames, Cas. 88, Bish. Torts, 196, Wat. Tres. 152-157; Bell v. Hansley (1855), 3 Jones (N. C.), 131; McClain, C. L. 249, 1013. *Volenti non fit injuria;* S. v. Beck.

HEIR; HEIRSHIP. How proved. 2 Gr. Ev. 353-361; Bouv., And. Dic.; 7 Mews' E. C. L. 604-608. How protected under doctrine of undue influence. Ans. Conts. 169; 21 Cyc. 408-432.

Adoption; effect. Hockaday, 200 Mo. 456, 118 Am. St. 672-688, ext. n.

Heirs and devisees, when liable for debts of ancestor. Crawford, 58 W. Va. 600, 112 Am. St. 1014, 1027, n.

HENDERSON'S DISTILLED: Bassett.

HENDRICK v. LINDSAY: L.C. 319.

HENLEY v. MAYOR OF LYME REGIS: *Sub* Hill v. Boston.

HENLEY v. WILSON (Cal.) Husband liable for torts of wife. *See* HUSBAND.

HENNEN: *See* Hannem.

HENSLEY v. TARTAR (1860), 14 Cal. 508; *stated* in Bell. Denials must be certain. Dickson: 34.

HE WHO COMES INTO A COURT OF equity must come with clean hands. Collins, 70 Fed. Rep. 854, 97 Tenn. 180, 11 Tex. Civ. App. 624. *See* EQUITY MAXIMS.

HE WHO HAS COMMITTED INI-quity shall not have equity. Collins; *In pari,* etc.; Ellis v. Newbrough, *sub* Horn.

HE WHO IS SILENT WHEN CONScience requires him to speak shall be debarred from speaking when conscience requires him to be silent. 93 Va. 415; Bro. Max. 138; *Allegans.*

HE WHO SEEKS EQUITY MUST DO equity. 109 Ala. 548; 166 Ill. 183, 67 Ill. App. 440; 11 Tex. Civ. App. 162. *See* EQUITY. He who will have equity done to him must do equity to the same person.

HEYDON'S CASE (1584), Co. Rep. 7*a*-9*a*, 14 Rul. Cas. 816-833, Suth. Stat. 162, 207, 300, 418, 1 Kent, 464 (all construction should be as near the common law as possible).

Cited, § 137, Gr. & Rud.; §§ 289, 292, 295, Hughes' Proc.

Boni judicis, etc. Remedial statutes should be liberally construed. Heydon's; Twyne's; Cool. Const. Lim. 95, n., 7th ed.

Concordare leges legibus est optimus interpretandi modus. Bates: 225. *See* STATUTES; Cool. Const. Lim. 94, 7th ed.

HIBBLEWHITE v. M'MORINE (1840), 6 M. & W. 200, 5 *id.* 753, 9 Eng. Ry. & Canal Cas. 37, 51, 8 Rul. Cas. 627, Sto. Ag. 49, 1 Jones, Mort. 90, Mews' E. C. L.; 3 Wash. R. P. 242; Mech. Ag. 94; Huffc., Reinh.; 1 Danl. Nego. Insts. 148, 2 Pars. N. & B. 35, 36, 1 Rand. Com. Paper, 74, 134; 1 Pars. Conts. 118, 316, 2 *id.* 843, Bish. 1167, 2 Page, 565, Bro. Max. 697; 1 Jones, Mort. 90, Dev. Deeds, 1 Gr. Ev. 568, 568*a*, 1 Wh. Ev. 633; Ewart, Estop. 434, 451.

Cited, §§ 25, 87, Hughes' Conts.; § 112, Hughes' Proc.; § 303, Gr. & Rud.

Hibblewhite v. M'Morine stated: Sealed instruments; deeds; carte blanche authority to fill blanks. Authority to make or add to a sealed instrument must be authorized by writing under seal. *Nihil tam conveniens,* etc.; 2 Whart. Conts. 687.

Clark v. Graham (1821), 6 Wheat. 577; Basford, 9 Allen, 387, 85 Am. Dec. 764; Upton v. Archer (1871), 41 Cal. 85, 10 Am. Rep. 266; Elwell v. Shaw; Loach; Master; Steiglitz, Holt, N. P. 141 (3 E. C. L. R.), 17 R. R. 620, 8 Rul. Cas. 622 (an authority to execute a deed must be by deed); Tupper v. Foulkes, 9 C. B. (N. S.) 797 (99 E. C. L. R.), 8 Rul. Cas. 624 (execution by agent); Preston, 23 Gratt. 600, 14 Am. Rep. 153, 12 Am. Law Reg. (N. S.) 669-715, ext. n.; 2 Dev. Deeds, 456.

Contra: Texira v. Evans; Nelson v. McDonald (1891), 80 Wis. 605, 27 Am. St. 71, n. Friend v. Ward. *See* also Phelps, 140 Mass. 36, 54 Am. Rep. 442; Brown v. Colquitt (1884), 73 Ga. 59, 54 Am. Rep. 869; Richards, 137 N. Y. 183, 23 L. R. A. 601, n.; Bish. Conts. 1168, 1169: cases; 1 Jones, Mort. 90: cases.

Commercial paper. For rule with reference to commercial paper, see Angle; Thomson; *Qui facit per alium facit,* etc.; Hunt; McNaughten, 11 Ohio, 223, 38 Am. Dec. 731-735: cases; Sto. Ag., Mech. 93; Wh. 48, 2 Pom. Eq., *q. v.,* 1 Sto. Eq. 112.

Filling blanks in deeds. 1 Dev. Deeds, 456-463. Hibblewhite followed; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; Ewart, Estoppel, *q. v.* (able *resume*); Cribben v. Deal (1891), 21 Or. 211, 28 Am. St. 746, n., denying *Master.*

Appeal bond. Authority to execute must be under seal. Maus v. Worthing (1841), 3 Scam. (Ill.) 26, Breese dissenting.

Seal, if affixed and not required at common law, is surplusage. Gibson.

Rose v. Douglas Tp. (1893), 52 Kan. 451, 39 Am. St. 354 (sureties estopped, if blanks are filled); Palacios v. Brasher (1893), 18 Colo. 593, 36 Am. St. 305, n.; Wiley v. Moor (1828), 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696; Richards, 137 N. Y. 173, 32 Am. St. 704, n., 23 L. R. A. 601 (writings executed in blank; filling of, when valid); Humphreys, 97 N. C. 303, 2 Am. St. 293 (agent must be authorized under seal).

Partners cannot bind each other under seal without special authority. 3 Kent, 47; Edwards, 146 Ill. 14, 37 Am. St. 189, n.

Texira v. Evans (1793), *cited in Master;* Ewart, Estop., 451; 1 Gr. Ev. 568*a*, Tied., R. P., § 789, 1 Jones, Mort. 90, 34 Am. St. 890, 3 Wash. R. P. 241; Wiley, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696, 19 L. R. A. 505; Sto. Ag. 49, 1 Rand. Com. Paper, 74, 184, 2 Pars. N. & B. 36, 3 Wash. R. P. 240, 3 Kent, 90.

Rationale of Texira is the same as in Lickbarrow, i. e., where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer. Ewart, Estop.; King County, 5 Wash. 536, 34 Am. St. 880, 890.

Sureties on bonds, when exonerated because of negligence in execution. Van Etta, 28 Wis. 33, 9 Am. Rep. 486; *cited,* 1 Jones, Mort. 90 (filling blanks in deeds).

Deeds; filling blanks. Blanks in deeds may be filled without authority under seal. *Contra,* Hibblewhite; Mackey, 50 Mo. App. 190: cases; 35 Cent. L. J. 220; 1 Jones, Mort. 90; Cas. *pro* and *con.*

Commercial paper. Any holder may fill blanks upon implied authority. *Angle.*

Brookshire v. Brookshire (1847), 8 Ired. Law (N. C.), 74, 47 Am. Dec. 341-348, Sto. Ag. 49, n.; Mech. 217, Wh. 52, 2 Wh. Ev. 1018, 1 Chit. Conts. 278, Bish. 1050.

Sealed instruments; revocation. Revocation of sealed instruments may be *by parol. Nihil tam conveniens,* etc.; Loach.

Wadsworth v. Wendell (1821), 5 Johns. Ch. (N. Y.) 224.

A vendor, for a valuable consideration, undertook to convey land, but omitted a seal to the deed. *Held,* this raised a trust which equity would perfect. Wadsworth v. Wendell. But otherwise where the conveyance is voluntary. Ellison v. Ellison (1802), 6 Vesey, 656, 1 Lead. Eq. Cas. 382, n., 3 Pars. Conts. 314, Pom. Eq., Sto., Bish., Per. Trusts, 2 Kent, 467 (voluntary trusts, if perfected, enforceable).

Trusts. Imperfect conveyance may constitute a trust. Wadsworth.

Executory contracts under seal cannot be varied by parol. Bro. Max. 877, 608; 1 Gr. Ev. 276; Bish. Conts. 14-37; Bowditch, 139 Mass. 283; Coe, 72 N. Y. 141, 28 Am. Rep. 120; Drumright, 16 Ga. 424, 60 Am. Dec. 738, 1 Wh. Ev. 624-632; Worrall: 390 (contracts). *See* ORAL EVIDENCE.

Contract concluding thus: "Witness my hand and seal," is a deed without the seal. McCarley v. Board of Supervisors (1880), 58 Miss. 483, 38 Am. Rep. 338.

Sealed instrument, varied by simple writing indorsed thereon, constitutes all a simple contract, and if a further modification (under seal) is added it converts all into a specialty. Wood, Lim. 26, n.; Loring, 13 Gray, 228; Hydeville Co., 44 Vt. 395; Horwitz, 40 Mo. 557, 93 Am. Dec. 321 (a course of dealing may modify a specialty); Ake's Appeal, 74 Pa. St. 116.

Hibblewhite.—

See Bish. Conts. 129-133, 136, 874; PRACTICAL CONSTRUCTION.

And it is held that no recovery can be had on a contract in part a specialty and partly simple. Toothaker, 13 Colo. 220 (municipal bond). Title to land cannot be divested by surrender and cancellation of grantee's deed. Watters, 53 Ark. 509, 22 Am. St. 478, n.; 1 Gr. Ev. 265, n.

HICKORY v. U. S.: L.C. 194.

HIGGINS v. WORTELL (1831), 18 Cal. 331. Denials must be precise and certain. Dickson: 34.

HIGHAM v. RIDGWAY: L.C. 213*e*.

HIGHER LAW: *See* GROUNDS AND RUDIMENTS. §§ 4, 5, 45-72, Gr. & Rud. The prescriptive constitution. §§ 80, 118, 187, 188, *id.*

HIGH POLICIES OF PROCEDURE: Or the conserving principles of procedure. Defined and elucidated, §§ 83-123, Gr. & Rud. *See* DEFINITIONS; GOVERNMENT; CONSTITUTIONALISM.

HIGHWAY: Nuisance to; indictment for; form of. R. v. Waverton. *See* LAW OF THE ROAD; 1 Bouv. Dic. 947-950; 15 Mews' E. C. L.; 101 Am. St. 97-118 (duty of land owners).

HILBERRY v. HATTON (A trespasser conveys no title to property wrongfully in his possession). *Sub* Bentley; Kirkwood; Huffc., Tiff., Reinh. Ag.

HILLIARD v. RICHARDSON: *Sub* M'Manus.

HILL v. CITY OF BOSTON (1887), 122 Mass. 344, 23 Am. Rep. 332-367, 2 Thomp. Neg. 698-806, ext. n., 6 Am. & Eng. C. C. 54, 37 L. R. A. 303, 142 Ind. 31, 39 L. R. A. 53, 62, 96 Am. St. 663, n., 1 Beach, Pub. Corp. 458, *q. v.*, Dill., Bish. Torts, Cool. Const. Lim., Jones, Neg. Munic. Corp., 1 Kinkead, Torts, 97, Huffc. Ag., Busw. Pers. Inj., Freel (Ind.), §§ 303, 306, 309, 348, Hughes' Proc.

Cited, §§ 63, 64, 67, 296, Gr. & Rud.

Hill stated: Hill, a boy of eight years, sued the city of Boston for damages he received in falling over a stairway railing, while exercising due care, the railing being in a dangerous condition, of which the school committee had long had notice. But they were not charged with having improperly constructed the building, nor that they had the power to rebuild, but only with that of keeping the building in good order when built, and with the general charge and management of the schools and of procuring a suitable place for the schools where there was no schoolhouse. It was conceded that the establishment, maintenance and running of the schools was a public duty imposed by operation of general laws for the benefit of the public, from the performance of which the municipal corporation received no especial profit or advantage (Bartlett; White v. County) not shared in and enjoyed by the whole public. *Held:*

1. That a municipal corporation is not liable for negligence in the performance of a public duty cast upon it by a general law.

2. That a municipal corporation discharging powers imposed upon it by general laws is not liable for injuries inflicted in the discharge of public duties for the public welfare.

Qui sentit commodum, etc.; Russell, 8

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Wash. 156, 40 Am. St. 895-899, n. (a laborer in a public park cannot recover for negligence of officers charged with keeping it); Moffitt, 103 N. C. 237, 14 Am. St. 810, n. (city not liable for exercise of sovereign powers. Perry v. W.); Shear. & Redf. Neg. 118: cases; Cool. Const. Lim. 253-257, n., Whart. Neg. 251: cases; Cool. Torts, 624 (2d ed.); Freel, 142 Ind. 157, 37 L. R. A. 301, n.: cases (cites and follows Hill); Folk, 108 Wis. 359.

Hill v. City of Boston states and reviews Russell v. Men of Devon (county not liable for defective bridge); White v. County; Bartlett (overseers of highways not liable in damages); Henley v. Mayor of Lyme Regis (its limitations and distinctions stated); McKinnon v. Penson; Parnaby v. Lancaster Canal (here was a private corporation which made the canal and took tolls therefrom for its profits); Mersey etc. [town council of Liverpool liable for a bank of mud negligently suffered to remain in the docks. They were allowed to collect tolls,, as in Lancaster, 11 Adol. & Ell. 223 (39 E. C. L. R.), 3 Nev. & Per. 223, 3 Per. & Dav. 162, 1 Thomp. Neg. 541]; Bailey v. N. Y.; Rochester White Lead Co. (city constructed a defective and insufficient sewer. The sewer was *too small* and was *unskilfully* constructed, and thus unsuited to carry off the water); Weet v. Brockport (municipal corporations liable for defective streets, founded on the consideration: "the surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation to perform with fidelity duties which the charter imposes"); Chicago v. Robbins (city liable for defective streets). Besides these, other cases are cited and stated, and the principle deducible is whether or not the duty is imposed by general law for the public good—imposed for the public welfare and uninvited by those sought to be charged, who derive no profit or benefit from it or other emoluments excepting statutory fees. It is otherwise where the franchise is sought, or depends on acceptance (Weet; Henley), or where rates or tolls may be charged. Bro. Max. 4-10, 712: cases; Henley. *One elected to an office must serve. Salus populi,* etc. A duty imposed by general law for the public welfare must be exercised by some one, like establishing and maintaining the school in *Hill.* The exercise of governmental power within the limits of jurisdiction for the public welfare, and incidentally causing damage, is not an actionable wrong; it passes as *damnum absque injuria.* That immunity is given which is accorded judicial officers acting within their jurisdiction, and practically to the superior judicial officer without any limitation whatever. Lange: 159.

Legislative corporations for governmental purposes (White v. C.) are not liable, like money corporations, carrying on business for profit. Hill; *Fowle v. Alex-*

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andria (1830), 3 Pet. 398, 409: *stated,* Busw. Pers. Inj. 63; Bro. Max. 4-10: cases; Shear. Neg. 118; Thomp. Neg., *q. v.*; Barron, 94 Mich. 601, 19 L. R. A. 452: cases; 34 Am. St. 366; Jernee v. County, 52 N. J. L. 553, 11 L. R. A. 416, n.; Brown, 34 W. Va. 299, 11 L. R. A. 121 (not liable for acts of officers); Himes, 72 Mich. 278, 1 L. R. A. 844, n.; Tyler v. Pomeroy.

There is no liability respecting solely governmental duties. Jones, Neg. Corp. 27-35, 245.

Municipal corporations; negligence of, generally; their liability. Chope, 78 Cal. 588, 12 Am. St. 113, n., 4 L. R. A. 325, n. (state decisions gathered and leading cases reviewed); Cool. Torts, 141, 738-750 (2d ed.), Shear. Neg. 116-154; Whart. 205-267; 2 Kent, 284.

Power to prohibit what state law punishes. Thrower, 124 Ga. 110, 110 Am. St. 146-151, ext. n.

For acts of its officers and agents. 1 Beach, Pub. Corp. 245-263, 730-735. Not liable for negligence of employees. McFadden, 119 Iowa, 321, 97 Am. St. 321, n.

For unlawful arrest and false imprisonment. Bartlett, 101 Ga. 300, 44 L. R. A. 795-801, ext. n.

Cannot pollute stream. Platt Co., 72 Conn. 531, 48 L. R. A. 691, ext. n. *Contra:* Va.paraiso, 153 Ind. 337, 48 L. R. A. 707.

City not liable for sickness caused by unsanitary condition. Hughes, 161 N. Y. 96, 46 L. R. A. 636, n. *Liability of public and private corporations.* 1 Kinkead, Torts, 96-110.

Nuisances; municipal corporations are liable like individuals. Winchell, 110 Wis. 101, 85 N. W. 668, 84 Am. St. 902-926, ext. n. (cannot pollute streams); Pierce, 107 Tenn. 224, 89 Am. St. 946 (a county is liable for a nuisance as is an individual).

Are liable for arrests under void ordinances. McGraw, 98 Ky. 673, 47 L. R. A. 593, n. (*contra* cases).

Street parades; obstructions, etc.; power over. Love, 128 Mich. 145, 55 L. R. A. 618, n.; Landon, 180 N. Y. 48, 105 Am. St. 109 (nuisance).

A municipal corporation is bound by the acts of its officers only when within the charter or scope of its powers. Acts outside of powers of the corporation or of the officers appointed to act for it are void as respects the corporation, and such corporation is not liable therefor. Wallace, 9 Okla. 339, 48 L. R. A. 620, n.; Merchants' Bank. Liability of the state and its agencies for torts of officers. Huffc. Ag. 258.

Nuisance; power to define, prevent and abate nuisances. Grossman, 30 Or. 478, 36 L. R. A. 593-615, ext. n.; Evansville; S. v. Karstendiek (1897), 49 La. Ann. 1621, 39 L. R. A. 520-529, ext. n.; 80 Am. St. 214; Miller v. Horton.

Coasting in streets. Dudleigh, 115 Ky. 5, 103 Am. St. 253-295, ext. n.

Abatement of nuisances. Salus; Miller v. Horton; 80 Am. St. 214.

Public schools; rules prescribing attendance; Catholic holidays. Ferriter, 48 Vt. 444, 15 Am. Law Reg. 570-592, n., 21 Am. Rep. 133; Const. Lim. 223-226; Stephens.

Vaccination may be compulsory, when. Potts, 167 Ill. 67, 39 L. R. A. 152; Blue v. Beach, 155 Ind. 121, 50 L. R. A. 64, n.

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Sectarian teaching; what cannot be enjoined as. Hysong, 164 Pa. 629, 44 Am. St. 632, n., 26 L. R. A. 203; State, 65 Neb. 853, 59 L. R. A. 927, n.; 69 Kans. 53, 105 Am. St. 148-157, ext. n.

Power of teachers to chastise. Stephens; S. v. Vanderbilt, 116 Ind. 11, 9 Am. St. 820; Cool. Const. Lim. 224.

School boards; teachers; powers of. S. v. Burton, 45 Wis. 150, 30 Am. Rep. 706, 18 Am. Law Reg. (N. S.) 233-242, n.; 2 Beach, Corp. 1351-1377; 102 Am. St. 528-534.

Suspension; powers of board. Board, 101 Ga. 422, 41 L. R. A. 593, ext. n.; 65 Am. St. 312.

Colored children; separate schools for. P. v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232-259, ext. n.

Text-books; adoption of. Campana, 17 Mont. 548, 36 L. R. A. 277-281, ext. n.; Leeper, 103 Tenn. 500, 48 L. R. A. 167.

Charitable institutions; liability for negligence. Williamson, 15 Ky. L. R. 629, 23 L. R. A. 200, n.; Adams, 122 Mo. App. 675, 64 Cent. L. J. 214-220.

Cognate cases of Hill: Goddard, 84 Me. 499, 30 Am. St. 373-413, ext. n.; Barron (market house); Finch, 30 Ohio, 37, 27 Am. Rep. 414, n.; Howard, 153 Mass. 426, 12 L. R. A. 160: cases; O'Leary, 79 Mich. 281, 7 L. R. A. 170; Freel: cases (cites and follows Hill); *Perry v. Worcester,* 6 Gray, 544, 66 Am. Dec. 431-442, n.; Allen v. Boston, 159 Mass. 324, 38 Am. St. 423, n. (sewers; liability for defects and want of repair); *Rochester.*

Liability for mobs. New Orleans, 10 U. S. Cir. Ct. Ap. 361, 62 Fed. 240, 10 Am. R. R. & Corp. Rep. 721-737, ext. n.; Gianfortone, 24 L. R. A. 592-606, ext. n., 26 *id.* 329; Darlington, 31 N. Y. 164, 88 Am. Dec. 248-271, n.; Cool. Const. Lim. 293, note 27 Am. Rep. 83-85; Board, 62 Ohio, 318, 78 Am. St. 718, n.; Chicago, 57 C. C. A. 509-528, ext. n.; Chicago, 196 Ill. 54, 89 Am. St. 243, n. (cities not liable for mobs, except by statute).

Not liable for negligent acts of firemen. Dodge, 17 R. I. 664, 15 L. R. A. 781, n. *Nor for torts of policemen.* Whitefield, 84 Tex. 431, 15 L. R. A. 783, n. *Their liability for torts and crimes.* Wyatt, 105 Ga. 312.

Liability for unauthorized acts of officers and agents. Salt Lake, 118 U. S. 256, 1 Dill. Munic. Corp. 973*a*, 1 Beach, 594, 2 Beach, Conts. 963-1231. The city, without authority, invested in a distillery and ran it, and made false returns to escape paying the government tax, which was afterward assessed, which the city paid under protest, and then sought to recover it upon the ground of *ultra vires*—that the city had no authority to engage in the business. *Held,* that the city was liable. Salt Lake, *supra;* Hilsdorf, 45 Mo. 94, 100 Am. Dec. 352-360, n.; Hitchcock; Merchant's Bank.

Not liable for injuries done a convict in a workhouse established by the city. Curran, 151 Mass. 505, 3 Am. R. R. & Corp. Rep. 130, n., 8 L. R. A. 243, 2 Dill. Munic. Corp. 965-985, 1 Beach, 730-775, page 1083.

Or for injuries inflicted upon prisoners in jail from neglect or otherwise. Davis, 90 Tenn. 599, 5 Am. R. R. & Corp. Rep.

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169-172, n.; Shields, 118 N. C. 450, 36 L. R. A. 293-296, n.

Municipal and quasi-municipal corporations; counties; highways. Counties not liable for defective ways. White v. County, 58 Ill. 297, 11 Am. Rep. 65, n.; *stated*, 1 Beach, Pub. Corp. 735; *stated*, 2 Dill. 963, 997, 1018; Templeton, 22 Or. 313, 15 L. R. A. 730-736; cases (excellent *resume*); Busw. Pers. Inj. 53, 62; Overholzer, 68 Ohio, 236, 67 N. E. 487, 96 Am. St. 658; *Bartlett;* Jasper County, 142 Ind. 572, 39 L. R. A. 58-75, ext. n.; Rohrbough, 39 W. Va. 472, 45 Am. St. 925, n. (county liable). § 309, Hughes' Proc.

Distinction between municipal and *quasi*-municipal corporations. Henley; Weet. Liability of towns and cities. Bailey v. Mayor, etc.; Russell v. Men, etc.; Hill (city not liable for defective building); Heigel, 84 Tex. 392, 31 Am. St. 63; Downing, 87 Ky. 208, 12 Am. St. 473, n.: cases; Bailey, 5 So. Dak. 393, 49 Am. St. 117, n.: cases; County, 18 Colo. 474: cases; Mech. Pub. Off. 350; 1 Beach, Pub. Corp. 258-263; 68 Am. Dec. 294-300, n.: cases; 1 Kinkead, Torts, 97.

Mob; riot; injuries done by. Counties not liable for, at common law. Hill. Lynching of a person by a mob. Brown, 55 S. C. 45, 44 L. R. A. 734.

Have only such powers as are conferred by statute, and these are strictly construed. Wh. Conts. 143; 1 Beach, Pub. Corp. 618; Lebcher, 9 Mont. 315; Stetson. Are not liable for damages for wrongful attachment of property. Reed, 125 Mo. 58, 46 Am. St. 466, 39 L. R. A. 33-82, n.

A sale and conveyance of an academy by a county to a presbytery is held to be void unless made under legislative authority. Jefferson Co., 74 Miss. 435, 36 L. R. A. 798.

Quasi-corporations. 1 Dill. Corp. 22-31; Stetson; 33 L. R. A. 118-122, ext. n. (county commissioners cannot lease county property).

Wrongful acts of officers; liability for. Tyler v. Pomeroy; Pitkin, *supra;* Gilman, 8 Cal. 52, 68 Am. Dec. 290-300, ext. n.; Sievers, 115 Cal. 648, n.

Counties are not liable for torts. 2 Dill. Munic. 963. *Cf.* Schussler, 67 Minn. 412, 64 Am. St. 424, n., 39 L. R. A. 75-82, n.; Hughes, 147 N. Y. 49, 39 L. R. A. 33-82, ext. n.: cases; Lefrois, 162 N. Y. 563, 50 L. R. A. 206, n. *Nor for malice or negligence of its agents.* Packard, 94 Iowa, 277, 58 Am. St. 296, n.

Quasi-municipal corporations only liable for negligence when made so by statute. Shear. Neg. 118: cases, 346: cases; Hunsaker; Wh. Neg. 351. 956. Not liable for tort, *e. g.*, obstructing a water-course. Downing, *supra;* Cool. Const. Lim. 247; 1 Beach, Corp. 258-263, 734; Pitkin, *supra;* 68 Am. Dec. 294-300, n.

A county is not a municipal corporation in the full sense of the term. Schweiss, 23 Nev. 226, 34 L. R. A. 602; Jefferson, *supra.*

State liable for defective bridge. Gibney v. S.

Statutes alone make corporations liable for defective highways. Wood. Nuis. 317; Weet; Board of Com., 120 Ind. 426, 16 Am. St. 325, n., Jones, Munic. Corp., *q. v.*

Quasi-corporations like school districts are not municipal corporations in the meaning of a statute expressing the latter. Frans, 30 Neb. 360, 27 Am. St. 412, n.

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(distinctions finely drawn); 33 L. R. A. 118-122, n.

Respondeat superior does not apply to corporations, as to other persons. Fry, 86 Va. 195, 19 Am. St. 879, n.; Pitkin, *supra*, 22 Colo. 125, 55 Am. St. 117, n.

Actions by and against; conditions precedent; procedure. 5 Encyc. Pl. & Pr. 291-300; Soderberg; 39 L. R. A. 33-82 (liability of counties in actions for tort and negligence). *See* DEMAND; NOTICE OF SUIT.

Right of a municipality to be a part owner of property. Ampt, 56 Ohio, 47, 35 L. R. A. 737, n.

Garnishment; municipal corporations not subject to. Summerfield, 14 Wash. 495, 37 L. R. A. 207, n.: cases; Sherman, 94 Tex. 126, 86 Am. St. 825.

Executions against counties; generally will not issue. Emery, 14 Utah, 328, 60 Am. St. 898, n.

Burning an infected house by town or county officers is their own personal tort. Prichard, 126 N. C. 908, 78 Am. St. 679, n.; American Print Works.

Counties; contracts of, when ultra vires. Cannot contract for vaccine virus. Daniel, 113 Ga. 570, 54 L. R. A. 292, n.

Contracts of corporations; when ultra vires. Williams: 322; *Weet*, 16 N. Y. 161, n., 2 Thomp. Neg. 678, n., Dill. Munic. Corp., Beach, Pub., Busw. Pers. Inj., Shear. Neg., Whart., Thomp., 1 Wat. Tres. 51, Cool. Const. Lim. 302, 303.

Acceptance of charter by a municipal corporation raises an implied contract, upon which rests their liability for defective streets. Weet. *See* Lycoming; Hill; 2 Dill. Corp. 996-1023, 1052, 2 Beach, 1209; Blyhl, 57 Minn. 115, 47 Am. St. 596, n.; Russell, 116 N. C. 720, 47 Am. St. 823, n.; Lorence, 13 Wash. 341, 52 Am. St. 42; Sutton, 11 Wash. 24, 48 Am. St. 847-858, n.; 1 Kinkead, Torts, 103: cases.

A county is an enforced organization and is therefore not liable. White v. County, 1 Beach, Corp. 547. Many cases hold that the legislature has power, even in our decentralized form of government, to create municipal corporations against the consent of the corporators. 15 Am. & Eng. Encyc. Law, 962; P. v. Butte, 4 Mont. 179, 47 Am. Rep. 346. From the latter standpoint, it would seem that such corporations would not be liable, as where the implied contract existed. Arkadelphia, 49 Ark. 139, 4 Am. St. 32, n. (statutes alone make towns, counties and cities liable; they are not liable at common law); Gosport, 112 Ind. 133, 2 Am. St. 164; Goshen, 119 Ind. 368, 5 L. R. A. 253, n. It is held that an attorney appointed to prosecute may recover fees. Hyatt, 121 La. 292, 100 Am. St. 354.

Ways; injuries from. Busw. Inj. 167-191.

A municipal corporation is liable for the condition of its streets without notice. Omaha, 35 Neb. 68, 37 Am. St. 432; Farquar, 18 Or. 271, 17 Am. St. 732, n.; Buchanan (1894), 66 Vt. 129, 44 Am. St. 829, n., 28 L. R. A. 488.

Sidewalks; defects in; city liable for. McClure (1893), 84 Wis. 269, 36 Am. St. 924, n.; Denver, 10 Colo. 375, 3 Am. St. 594, n.; Chamberlain, 84 Wis. 289, 36 Am. St. 928, n., 19 L. R. A. 513 (slippery sidewalks; not liable for). Not liable for dangerous condition of its streets caused by negligence of officers. Chope; Thompson, 83 Mich. 173, 10 L. R. A.

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734, ext. n. (states classified). *See* Ellis, 2 Mass. 368. *Power over streets.* Kohlhof, 192 Ill. 249, 85 Am. St. 335, n.

Cities must keep streets in safe condition, but they are not insurers. Magaha, 95 Md. 62, 93 Am. St. 317-327, n.: cases; Friedman, 71 N. J. L. 605, 70 L. R. A. 147 (building material in streets).

Statute may cast duty on abutting lot-owners. Lincoln, 63 Neb. 707, 93 Am. St. 478, 484, n. *Defective sidewalks.* 2 Beach, Corp. 1211; Fisher; Chicago v. Robbins. *Negligence; municipal corporations; highways; streets;* liability of municipal corporations for defective highways. Bartlett: 6; Henley; Bailey v. Mayor; White v. County.

Rationale of the rule. Hill: cases; Whart. Neg. 274; *Qui sentit commodum,* etc., applies. 1 Add. Torts, 77; Henley; Denver, 7 Colo. 328 (obscure reasoning). *Rex non potest peccare.*

Assumpsit by U. county against L. county for costs laid and paid out by the former for the use of the latter in causes properly belonging to the latter, but tried and disposed of in the former. After these costs had accrued an act was passed, remedial in character, making the already existing moral obligation enforceable. The validity of this act was questioned. *Held,* the power of legislatures is omnipotent, except as limited by constitutions, and in granting remedies the powers are ample. *Lycoming v. Union,* 15 Pa. St. 166, 53 Am. Dec. 575-581, n.: stated; 1 Dill. Corp. 75; *cited:* Cool. Const. Lim. 464 (6th ed.); Stockdale.

The unconstitutionality of an act must be pointed out; the burden is on him who assails it. Actore, etc. *The infraction must be shown, and must be clear and certain.* Lycoming.

Moral obligation may be made enforceable. Lycoming; Lee: 318; Andes v. Ely, 158 U. S. 312: cases.

Voluntary services not moved by previous request will support a promise. Lycoming. *See* Lampleigh: 301; Mills: 316.

Where one county is under a moral obligation to reimburse another for certain expenses, the legislature may give this legal effect by a subsequent act. Lycoming; O'Hara v. S. (1889), 112 N. Y. 146, 2 L. R. A. 603, 1 Dill. Corp. 75; Andes.

Legislatures may provide a remedy where right exists without one. Lycoming; Cool. Const. Lim. 464. *See* Terre Haute R. R. v. Ind.

Mandatory statutes to pay claims not legally binding on a municipality are valid. Cool. Lim. 464; 1 Dill. Corp. 75.

But if there be no equity or obligation to pay, such an act would be unconstitutional. Board, 51 Ohio St. 531, 25 L. R. A. 770: cases.

Municipal corporations; charter of, amendable at pleasure of legislature. Acceptance not necessary. Weet; East Hartford, 10 How. 511, 2 Danl. Nego. Inst. 1519*a*, 3 Pars. Conts. 481. It is otherwise with private corporations. Dartmouth.

Legislative control over public corporations. 2 Beach, Pub. Corp. 712-729; 2 Kent, 306.

Power of the legislature to impose burdens upon municipalities and to control their local administration and property. 68 Conn. 131, 48 L. R. A. 465-503, ext. n.

Public corporations are bound by principles of estoppel, ratification and good faith like individuals. Knox County v. Aspinwall, 21 How. 539-546, 9 Am. Law Reg.

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(O. S.) 347, 2 Beach, Conts. 1168, 1 Beach, Pub. Corp. 909, 2 Herm. Estop. 1229, 18 Gratt. 350, 98 Am. Dec. 659, Dill Corp., 1 Rand. Com. Paper, 1 Danl. 317, 2 Whart. Ev. 1147, Cool. Lim. 272, 3 Kent, 89; Hutchinson R. R., 48 Kan. 70, 15 L. R. A. 401-413: cases; Hitchcock; Philadelphia Co., 63 Neb. 280, 93 Am. St. 442-447, n. (does not apply to cities in corporate capacity); Whart. Conts. 143.

Corporations are liable for agent's frauds, malice and negligence. Whart. Conts. 131; Merchants' Bank; Craker.

Persons dealing with public agents must take notice of their powers. Knox County; Clark v. Des Moines; and of their jurisdiction. Windsor; Tyler.

Rochester White Lead Co. v. City of Rochester (1850), 3 N. Y. 463, 53 Am. Dec. 316, n., 2 Thomp. Neg. 673: *stated* in Hill; Shear. Neg., 2 Dill. Corp., Cool. Torts, Mech. Pub. Off., Whart. Neg., Ang. Waterc., 2 Beach, Pub. Corp., Cool. Const. Lim., Jones, Munic. Corp., 7 L. R. A. 466, 5 *id.* 129, Busw. Inj. 57, 1 Kinkead, Torts, 104: cases. *Cited,* §§ 309, 348, Hughes' Proc.

Liquor traffic, power over. S. v. Calloway, 11 Idaho, 719, 114 Am. St. 258, 304, ext. n.

Rochester stated: A company sued the city in an action on the case for damages done by penning back waters upon their factory and damaging a quantity of white lead. The city had constructed a culvert—sewer, and had made cuts and raised and changed grades, and in these operations had improperly and unskillfully (see *Blyth; Salisbury v. Herschenroder; Sutton v. Clarke; Whitehouse v. Fellowes*) constructed a culvert to carry away water. A flood from rain and snow proved that this culvert was inadequate to carry off such volumes of water, and overflow and damages resulted. Engineers testified that the culvert was too small, and that it was their custom to construct them large enough to provide against accidental obstructions and extraordinary freshets. *Held,* the company could recover.

See Spangler, 84 Cal. 12, 18 Am. St. 158, n. (city liable for defective public works, but not for overflow from other causes). Same point in Tate, 56 Minn. 527, 45 Am. St. 501, n.: cases; Nashville, 88 Tenn. 415, 7 L. R. A. 465; Jordan, 42 W. Va. 312, 57 Am. St. 859, n., 36 L. R. A. 519, n.; Kansas City, 52 Kan. 297, 39 Am. St. 349, n. (defective drainage); Chalkley, 88 Va. 402, 29 Am. St. 730-744, ext. n.; Perry, 6 Gray, 544, 66 Am. Dec. 431-442, n., Dill. Corp.; Allen, 159 Mass. 324, 38 Am. St. 423, n. (sewers; negligent keeping); Stone, 69 Kans. 287, 105 Am. St. 187; 13 Cyc. 25 (negligent construction).

Are liable for a nuisance. Chapman, 110 N. Y. 273, 6 Am. St. 366, 1 L. R. A. 296, n. (pollution of water); Metropolitan, 6 App. Cas. 193-216, 16 Rul. Cas. 556-586, n.: cases.

Baily v. Mayor of N. Y., stated and distinguished in *Rochester;* and the latter in *Hill.* These are important cases upon the liability of public officers and agencies discharging public duties. *See* Bartlett; Mersey Docks.

Municipal corporation liable for torts of its agents and servants in the execution of its powers. Mech. Pub. Off. 853, Dill. Corp. 980.

Hill.—

Ultra vires acts of corporations. Hitchcock; Merchants' Bank; Jones, Corp. 172-182; 2 Kent, 300; Whart. Conts. 130. See *Ultra vires.*

Not liable for. Mech. Pub. Off. 852, 2 Dill. Corp., 1 Beach; Horn, 30 Md. 218, Field, Ultra Vires, 507; Chapman, 28 S. C. 373, 13 Am. St. 681, n.: cases; Board of Co. Com., 51 Minn. 79, 38 Am. St. 492, n.; Orlando, 31 Fla. 111, 34 Am. St. 17-30, ext. n., 19 L. R. A. 196; Thayer, 19 Pick. 511, 31 Am. Dec. 157-161; Field, Ultra Vires, 524; Salt Lake, 118 U. S. 256; Auerbach, 23 Utah, 105, 90 Am. St. 685, n.; Dill. Corp., Beach, 2 Beach, Conts. 963-1231, Whart. 137.

Municipal corporation cannot assume a liability for negligence when no liability is imposed by law. Nashville, 92 Tenn. 335, 36 Am. St. 88, 19 L. R. A. 619; Bateman, 90 Ky. 390, 3 Am. R. R. & Corp. Rep. 508, 509, n.; and they cannot offer reward; Williams: 322. *Qui sentit,* etc.

Limitations of municipal indebtedness. Beard; Hitchcock v. Galveston.

Corporations may contract as individuals. Bank of Columbia v. Patterson (1813), 7 Cranch, 299, Cummings, Priv. Corp. 112, Cook, Corp., Dill., Beach., Sto. Ag., Whart., Rand. Com. Paper, Danl., Pars. N. & B., Chit. Conts., Ans., Bish., Beach, 646, 648, 1054-1093, Whart. 128, 130-137; Kent, 291; Arnold v. Pool; Field: 387. And they are so liable for torts. Craker; Merchants' Bank. See *Ultra vires.*

Seal of corporation. 159 Ill. 169, 50 Am. St. 146-159, ext. n.; Ans. Conts. 45; Whart. Conts. 128. *Effect of seal as evidence.* Morrison, 91 Me. 492, 64 Am. St. 257-265, ext. n.

Promissory note; may make to pay debt. Andres, 62 O. St. 236, 78 Am. St. 712, n.: cases. *See* Batty; CORPORATIONS.

HINES v. ROBINSON (1869), 57 Me. 324, 99 Am. Dec. 712; *Verba relata,* etc. § 237, Hughes' Proc.

HISTORY OF THE LAW: *See* § 15, Gr. & Rud.; *Regula pro lege.*

HITCHCOCK v. GALVESTON (1877), 96 U. S. 341, 24 L. ed. 659, Dill. Corp., Beach, Corp., 2 Danl. Nego. Insts. 1520, Beach Conts., Whart.

Hitchcock stated—contract from estoppel: Hitchcock entered into a contract with the city of Galveston in a very regular way, which called for payments in excess of limitations of indebtedness. Still, he was allowed to recover. *See* Beard; Andes; Hill v. Boston; Cutter: 308; Boston Ice Co.: 320. *Contracts are not forced upon unwilling parties.* Bull.

Ultra vires contracts; right to recover of; estoppel of corporations. Dill. Corp. 444, 457-465, Mor. Corp. 648, 653, 689-706; Brunswick Gas Light Co., 85 Me. 532, 35 Am. St. 385-407, ext. n.; Greenville, 70 Miss. 669, 35 Am. St. 681, n.; Salt Lake; Merchants' Bank. Hitchcock rests on various grounds, some of which are not very clear; it reasons very much like Cooper v. Reynolds.

HITCHCOCK v. HAIGHT: L.C. 12.

HOARE v. RENNIE: Barnard v. Cushing.

HOCHSTER v. DE LA TOUR: L.C. 308*b*.

HOCKENBERRY v. MEYERS: *Sub* Cumber.

HODGES v. KIMBALL (1900), 104 F. R. 745-754.

Ad quæstionem facti, etc. Province of a court and jury. Where the evidence fails to show negligence as a proximate cause,

Hodges.—

the court should take the case from the jury. Capital Co. v. Hof; Bonnell: 185.

Railroad's duty to provide safety appliances and to inspect these and keep them in good repair.

Volenti non fit injuria: A brakeman by disobeying regulations of safety and prudence cannot complain if injured, nor can his representatives if he is killed. Employees and passengers judged by different rules of negligence.

HOGINS v. PLYMTON: L.C. 379.

HOLDEN v. HARDY: *See* Millett; POLICE POWER.

HOLIDAY: 1 Bouv. 952-954; And. Dic. *See* SUNDAY; *Dies dominicus,* etc.; 21 Cyc. 440-447.

HOLLAND v. BARTSCH (1889), 120 Ind. 46, 16 Am. St. 307; King: 205 (facts showing negligence must be pleaded).

Bicycle; rights of upon the road. Holland; Richardson, 176 Mass. 413, 79 Am. St. 320. *Bicycle law.* Taylor, 184 Pa. 465, 47 L. R. A. 289-304, ext. n.

Collisions; liability for. Myers, 110 Mich. 300, 33 L. R. A. 356; Cook, 103 Iowa, 500, 39 L. R. A. 488: cases.

Negligence; facts showing must be pleaded. Holland; L. & N. R. R., 125 Ala. 237, 50 L. R. A. 620; King: 205.

HOLLISTER v. NOWLEN: L.C. 354.

HOLMAN v. JOHNSON: L.C. 363.

HOLMES, U. S. v., *q. v.*

HOMESTEAD: Head of family, who is. Wike, 179 Ill. 257, 70 Am. St. 102-115, n.; 1 Bouv. 956-958; 102 Am. St. 386-412, ext. n. (abandonment of). Purchase money lien. Brown, 69 Ark. 123, 86 Am. St. 171-182, ext. n. Rights of child or children in homestead of parent. Battey, 62 Kan. 517, 56 L. R. A. 33-88, ext. n. Conveyance of by either spouse. Jerdee, 115 Wis. 277, 95 Am. St. 904-944, ext. n.

Family, what is. Sheehy, 128 Ia. 551, 4 L. R. A. (N. S.) 365-399, ext. n.; Grace, 96 Minn. 294, 4 L. R. A. (N. S.) 786-800, ext. n.

Generally: 21 Cyc. 448-645.

HOMICIDE: Right to kill. U. S. v. Holmes; C. v. Selfridge; McClain, C. L. 282-431; *notes,* Am. Crim. Reports; 3 Gr. Ev. 114-149; 2 Bish. Cr. Proc. 495-539; Bouv.; And. Dic.; 4 Mews' E. C. L. 1487-1545.

Statutory degrees of. Whitford v. C., 6 Rand. (Va.) 721, 18 Am. Dec. 771-787, ext. n.

Killing of adulterer of wife; when manslaughter. S. v. Yanz (1901), 74 Conn. 177, 92 Am. St. 205-230, ext. n. *Death must result in one year and one day.* R. v. Pym. *Aiming at one and killing another.* R. v. Serne. *Immoderate chastisement by teacher.* R. v. Hopley. *Provocation; cooling time.* R. v. Stedman.

Gross negligence supplies malice. R. v. Lowe; R. v. Longbottom. *Criminal neglect supplies malice.* R. v. Lowe. *Neglect of duty to provide a doctor.* R. v. Morby; R. v. Conde. *Wounded person's own neglect is no defense.* R. v. Morby. *Jurisdiction; venue.* C. v. Macloon: 172; R. v. Keyn: 171; R. v. Lewis. *Homicide in self-defense.* U. S. v. Holmes. *Compulsion.* R. v. Tyler. *Suicide is murder.* R. v. Cruse. *Agreement to die by suicide is agreement to die by murder.* R. v. Cruse.

From attempt to commit abortion. S. v. Power, 24 Wash. 34, 63 L. R. A. 902-920, ext. n. To prevent criminal or unlawful arrest. Morrison v. C., — Ky. —, 67 L. R. A. 259-550, ext. n. By official action or officers of justice. S. v. Phillips, 119 Ia. 652, 67 L. R. A. 292-313, ext. n.

Homicide.—
By misadventure. S. v. Legg, 59 W. Va. 315, 3 L. R. A. (N. S.) 1152-1167, ext. n. Insulting words, provocation. S. v. Buffington, 71 Kan. 804, 4 L. R. A. (N. S.) 154-169, ext. n.
Homicide, generally. *See* U. S. v. Holmes; C. v. Macloon; 21 Cyc. 646-1100.
HOOD v. SUDDERTH: L.C. 141.
HOOKER v. MILLER (1873), 37 Iowa, 613, 18 Am. Rep. 18-21; Cool. Torts; Bish., Wat. Tres.
Dangerous instruments. Liability for injuring a trespasser with. Bird v. Holbrook. *See* SELF-DEFENSE; Aldrich v. Wright.
HOOVER v. KING (1903), 43 Or. 281, 65 L. R. A. 790. Records are to show upon what issue or facts the judgment rests. Draper.
HOPKINS v. TANQUERAY: L.C. 378.
HOPPER v. COVINGTON: L.C. 4.
HORAN v. WAHRENBERGER: L.C. 85.
HORN v. BAKER (1808), 9 East, 215, 9 R. R. 541, 2 Sm. Lead. Cas. 246-270, ext. n., 2 *id.* 262-280 (122-146), 5th ed., 2 *id.* 295-307 (side pp. 262-280), 6th ed., 2 *id.* 225-243, 7th ed., 3 *id.* 1467-1494, 9th ed., 232-262, 11th ed. (citing English cases), 2 Mews' E. C. L. 435; 5 Jac. Fish. Dig. 6937, 6956, Mech. Ag. 1044, Bro. Max. 427, 1 Add. Torts, 610, 514, 1 Chit. Conts. 490, 500, 501.
Estoppel; reputed ownership clauses. Fixtures are not goods and chattels. Real owner may be estopped by clothing another with apparent ownership. Bentley v. Vilmont; Lindsay v. Cooper; Ewart, Estoppel; *Allegans contraria*, etc.; Horn v. Cole; Pickard v. Sears. *See* CONDITIONAL SALE.
HORN v. COLE (1871), 51 N. H. 287, 12 Am. Rep. 111-127, 12 Am. Law Reg. (N. S.) 303, 2 Pom. Eq. 804-822 (ablest case on equitable estoppel); 70 L. R. A. 577; Ewart on Estop. 6, 94, 158. *Cited*, § 69, Hughes' Conts.; Huff. Ag.
Cited, §§ 171, 173, 174, 180, 185, 289, 295, Gr. & Rud.
Equitable estoppel. Pickard; *Allegans contraria*, etc.; Freeman; Horn; Swan.
Presupposes error on one side and fault or fraud on the other. Sweeney, 70 Conn. 274, 66 Am. St. 101, n.
One must be misled to his prejudice, and without knowledge of the true state of facts or be charged with knowledge. Clark, 69 N. H. 147, 76 Am. St. 157, n.
One must be deceived; if he is not, there is no estoppel. 1 Page, Conts. 139; Ellis v. Newbrough (1891), 6 N. M. 181, 27 Pac. 490 (amusing and instructive decision—what is estoppel in "Tae"; the ground of the general demurrer is never waived; going to trial will not waive it; *In pari delicto* as a defense; *Volenti non fit injuria*; acquiescence; delay and its effect). *See* EQUITABLE ESTOPPEL; 36 L. R. A. 556; §§ 107, 177, 178, 181, 182, 184, Hughes' Proc.
HORNE v. HIGGINS, (1899), 76 Miss. 813. Catching bargains. *Sub* Chesterfield. *Cited*, §§ 150, 158, Hughes' Proc.
HORNER v. LEEDS (1855), 1 Dutch. (N. J.) 106, 2 L. C. Am. R. P. (Shars. & Budd) 30-128, ext. n. *Intentions gathered from whole instrument must govern. Ut res magis*, etc.; Mallan; Wilkins.
Duration of lease, if not definitely fixed, may be made certain by reference to collateral or extrinsic circumstances. Horner; Brown: 54; New Eng. Co. v. Standard Co., sub *Contemporanea*, etc.; Clayton.
A lease determinable upon continuance

Horner.—
of a certain business by a lessee ends, and without right of notice to quit, when he abandons that business. *Nullus commodum*, etc.; *Lex neminem cogit ad vana.* A tenant cannot dispute his landlord's title. Horner; *Allegans contraria*, etc. Tenant may show landlord has conveyed the leased premises. Horner.
HOSKINS v. P.: L.C. 80.
HOUGHTON v. GILBART (1836), 7 C. & P. 701 (37 E. C. L. R.). When a supreme court speaks, the dictionary is not law. *Cujus est instituere*, etc. *Cited*, §§ 4, 13, Hughes' Proc.
HOURS OF LABOR; REGULATION: Millett.
HOUSEHOLD FIRE INS.: L.C. 328.
HOUSTON v. WILLIAMS: L.C. 245.
HOWARD v. FLEMING (1903), 191 U. S. 126 (due process of law in state courts).
Cited, §§ 78, 93, 150, 214, 268, Gr. & Rud.
The review of a record for a federal question is more restricted when it comes from the highest court of a state, than when it comes from a federal court. *See* Loan Association v. Topeka; Gibson v. Mississippi (1895), 162 U. S. 565, 591; Howard v. Ky.; DUE PROCESS OF LAW.
The finding of a state court that a crime exists in that state is conclusive. *See* R. v. Wheatley; DUE PROCESS OF LAW.
Also its findings that allegations sufficiently present that crime. *See* U. S. v. Cruikshank; R. v. Wheatley.
The record from the state court must properly show that a federal question was raised and that objections and exceptions were taken and were properly preserved. Winona Case; *De non apparentibus*, etc.
The federal question or the character of the defendant must appear from the complaint. O. S. L. R. R. v. Skottowe (1895), 162 U. S. 490, 494; Winona Case (consent cannot confer jurisdiction). *See* DUE PROCESS OF LAW.
When causes originate in state courts, very liberal rules relating to res adjudicata prevail. Davidson v. New Orleans. It seems states may define that matter, also all the conserving principles, or depart therefrom at pleasure. Breeze; Howard v. Ky.
State may depart from or change the common law. West v. Louisiana (1904), 194 U. S. 258. *See* Terre Haute R. R. v. Indiana, 194 U. S. 579 (for strict limitations on state power to enforce its rights).
HOWARD v. HARRIS: W. & T. Lead. Eq. Cas. *See* MORTGAGE. Oral evidence; to show deed absolute is a mortgage. § 87, Hughes' Conts. *Cited*, §§ 20, 150, 239, 256, Hughes' Proc.
HOWARD v. KENTUCKY (1906), 200 U. S. 164-176.
"Due process of law," when a federal question. Fundamental right only is protected by that guaranty. If a juror is discharged in the absence of the prisoner this is not *ipso facto* reversible error; if error affirmatively appears from such action then it would be material error. The prisoner's presence is not indispensable in Kentucky. *Cf.* Sperry v. C. The Fifth and Sixth Amendments do not apply to the states. Barron: 241.
Imprisonment in violation of state constitution is no federal question. Carfer v. Caldwell (1906), 200 U. S. 293; Royall: 284.
Federal questions. Taylor v. Beckham; Kentucky v. Powers; Howard v. Fleming; Felts.
HOWARD v. S.: L.C. 166.
HUBLER v. PULLEN: *Sub* Munday: 79.

HUGHES v. CORNELIUS: *See* RES ADJUDICATA. *Cited,* § 62, Hughes' Proc.

HUGHES v. GRAEME: *Sub* Merest v. Hervey.

HUGHES v. P. (1885), 8 Colo. 536, 5 Am. Cr. Rep. 80-87, n.; 7 Crim. Law Mag. 280-288, n. §§ 120, 136, Hughes' Proc.

Consecutive prosecutions allowed when the same transaction violates federal, state and county, or town laws. Thiesen, 34 Fla. 440, 26 L. R. A. 234: cases; Bish. Stat. Crimes, 23. *See* Dill. Corp.; Cruikshank: 232.

HUGUENIN v. BASELY: *sub* Chesterfield. *Cited,* §§ 13, 52, 58, 62, 104, 106, Hughes' Conts.; § 158, Hughes' Proc.

HULBERT v. CHICAGO (1906), 202 U. S. 275-281.

Federal question, how raised. A claim of it at a confirmation sale is too late. Errors not assigned are waived in Illinois cases. Atlantic. Errors not argued are abandoned in Illinois. Atlantic.

State supreme court's construction of a statute is conclusive. The federal court will not question its compliance with the state constitution. R. R. v. Miller (1906), 206 U. S. 584.

HUME v. ROBINSON (1896), 23 Colo. 359. *Cited,* §§ 93, 118, 150, 237, Hughes' Proc.

Pleadings may be waived in Colorado. Breeze. This view enlarges the field of contracts and is to be considered with observations elsewhere made. *See* § 17, Hughes' Conts.; Campbell: 2; Garland: 60; Dovaston: 217; J'Anson: 91; Rushton: 5; Bristow: 135; THEORY OF THE CASE; DUE PROCESS OF LAW; *Consensus.* The above view is much opposed to other Colorado cases. *See* also, Thomas: 15: cases; Moynahan v. P. Much confusion exists in that state. There are many cases that can be cited either way, and affirming *Hume. See* Berdell v. Bissell; D. & R. G. R. R., 30 Colo. 77, 97 Am. St. 76 (there being no pleading, the court gathers the issues from the evidence). §§ 30, 20, 188, Hughes' Proc.

A cause of action must be stated to confer jurisdiction of the particular case. P. *ex rel.* Labbe v. Dist. Court; PROHIBITION (prosecution of gamblers enjoined for want of allegations—clearly held that jurisdiction depends on pleadings—allegations).

Holman v. Boston Co. (1896), 8 Colo. Ap. 282, 285-288; Persee, 23 Colo. 245 (waiver of and departure from pleadings, permissible); Water Co., 24 Colo. 344; Wood, 24 Colo. 134; Hurlburt, 26 Colo. 240 (answer waived, issues assumed); Johnson, 17 Colo. 59 (defective answer aided by proof); Fairbanks, 8 Colo. Ap. 190, 193.

Facts assumed are conclusive. Gurney, 32 Colo. 47; 2 Cyc. 675. Evidence will not supply *allegata.* Lynch, 32 Colo. 110.

Gelwicks v. Todd (1898), 24 Colo. 494, 1 Am. Prac. Rep. 613; Empson Packing Co., 26 Colo. 316; Newman, 23 Colo. 217; Denver Tex. R. R., 23 Colo. 456; Steinhauer, 11 Colo. Ap. 494, 499 (a complaint need not state a cause of action); Quinby, 8 Colo. 194; Jerome, 21 Colo. 322 (a reply can be waived); Schweizer, 14 Colo. Ap. 236, 238 (error must be assigned to complaint omitting material facts); Burlington, 17 Colo. 280, 286 ("the issues were greatly broadened by the evidence").

Essential mandatory record matter may be contracted away. Murphy, 1 Colo. 467 (order to file statutory record in vacation); Ritchey v. P. (1896), 23 Colo. 314. Cases are found that oppose the above views and which hold with *Rushton:* 5. And of such are the following cases:

Robinson, etc. Co., 13 Colo. 258, 261, 262 (extreme case for the old strict and necessary rule. *See* Crater, *ante*); Russell v. Shurtleff (singular and very strict).

Jansen v. Hyde (1896), 8 Colo. Ap. 38, 40 (and this denied at the same term, in the same book, by the same judge. *Id.* 285, 286. Jansen holds that by *confession* or *consent* a judgment may be entered without a complaint).

Beckett v. Cuenin (1890), 15 Colo. 281; Supply Ditch, 10 Colo. 327, 3 Am. St. 586 (answer must be sufficient), as in J'Anson: 91.

The common law and the statutory requirement for jurisdictional facts to appear of record in inferior and statutory tribunals abrogated. Liss, 2 Colo. 85, 88; Thorne, 8 Colo. 353; Behymer, 12 Colo. 352. *Contra,* and it seems unconsciously too. L.C. 131. The latter is in accord with *Crepps.*

The mandatory record is not the principal but is a secondary record. It yields to the statutory record. Atchison R. R., 2 Colo. Ap. 436.

The new and enlightened views of Mr. Thompson and others [2 Thomp. Tri. §§ 2310, 2311; And. Steph. Pl. § 230: cases (2d ed.); 2 Cyc. 689-691] are embraced and applied in an extreme way in some cases, and in others wholly disregarded.

Contracts relating to matters dependent on record are much affected where such contradiction exists, to say nothing of its attacks upon a definite theory of procedure. Where such confusion exists there is no certainty as to immaterial and collateral issues or departures, except as a court declares them from step to step; nor is there the motion in arrest of judgment, nor collateral attack, nor means of showing *res adjudicata,* nor of appellate procedure. *See* Breeze.

Contract works that teach that what ought to be of record must be proved by writing and by record may well take into account such cases as Hume. In many relations they affect contracts and titles to property. §§ 83-134, Gr. & Rud. They involve the rationale of what must be proved by writing, and also the integrity of leading and paramount subjects of law, already mentioned. Such a condition much opposes that stability, certainty and protection that government is organized to establish and maintain. In the last analysis government is affected. §§ 16-22, Hughes' Conts. See *Pactis,* etc.; *Consensus,* etc.; WAIVER; French v. Miller; THEORY OF THE CASE; PROCEDURE; LITERATURE.

The code provides that complaints shall state a cause of action; that filing an answer shall not waive this; and that all relief shall be within the facts stated. Waiving the pleadings and the record is nullification of code provisions. See STORY; THEORY OF THE CASE.

In Russell the court declared a judgment void because surplusage was found in the prayer.

Judgments as contracts are upheld or destroyed by strict construction on one hand or liberal on the other. Cujus est instituere ejus est abrogare.

HUMMER v. LAMPHEAR (1884), 32 Kan. 439, 49 Am. Rep. 491. Successive suits may be brought on a judgment. Hummer; Citizens', 26 Wash. 417, 90 Am. St. 748, n.; 19 Wash. 207, 40 L. R. A. 815; Hervey, 67 N. H. 342, 68 Am. St. 672, n.; Simpson, 23 Iowa, 81, 92 Am. Dec. 410. §§ 199, 328, Hughes' Proc.

Restrictions upon the rule. Thatcher v. Lyons (1898), 70 Vt. 438, 67 Am. St. 677, n., citing Hummer.

Necessity compels commencement of an action within the period of the statute of limitations. What the law compels it never condemns. *Necessitas*, etc. *Contra:* Hood, 11 Colo. 106, 109; Osborne, 9 N. D. 1, 81 Am. St. 51 (leave must be obtained); note §§ 27, 27*a*, Hughes' Conts.

HUMPHREYS v. McCALL: L.C 38.

HUMPHRIES v. BROGDEN (1850), 12 Q. B. 379, 70 R. R. 402, 1 Eng. Law & Eq. 251, Bigl. L. C. Torts, 536, 538, Moak, Underh., 410, 419, Cool., Add.; 1 Thomp. Neg. 263-282, n., 2 Gray, Cas. Prop. 66, 17 Rul. Cas. 407, 10 *id., q. v.*, 2 Wat. Tres. 735, Wood, Nuis. 176, Suth. Dam., Ang. Wat., Gould, Wat., Whart. Neg., Cool. Const. Lim., 2 Wh. Ev., 1 Wash. R. P., 2 *id.*, Bro. Max. 371.

Easements; servitudes; right to subjacent support of lands. *See* Smith; Bonomi.

Mining; right of mine owners to remove support from other mines is liberally viewed. Smith v. Kenrick (1849), 7 C. B. (M. G. & S.) 515 (62 E. C. L. R.), Bro. Max. 372. *See* Baird v. Williamson (1863), 15 C. B. N. S. 376 (109 E. C. L. R.).

HUNSAKER v. BORDEN: L.C. 259.

HUNT v. ROUSMANIER (1823), 8 Wheat. 174, 2 Mason, 244, 3 *id.* 294, 1 Am. Lead. Cas. 706-714, 197 U. S. 40, 52; Mech. Ag., Huffc., Reinh., Tiff.; Whart., Sto., Pars. N. & B., Pars. Conts., Chit., Bish., Page, Bisph. Eq., 1 Dev. Deeds, 2 Wash. R. P., 2 Dill. Corp., 2 Gr. Ev. 68*a*, 2 Per. Trusts, 2 Kent, 1 Beach, Conts.; 2 Warv. Vend. 599.

Cited, §§ 113, 114, Hughes' Conts.

Cited, §§ 293, 303, 306, Gr. & Rud.

Agency; death of principal revokes an agency. Hunt; Smout; Harper v. Little (1822), 2 Greenl. (Me.) 14, 11 Am. Dec. 1 (parties buy land of an agent at their peril); Mech. Ag., Sto., Whart., Chit. Conts., Ans., 2 Kent, 632, 644-646. Payment of agent after death of principal inoperative. Long, 150 U. S. 520. *See* Cassiday v. McKenzie (1842), 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76-91, ext. n. (payments good); Farmers', 139 N. Y. 284, 36 Am. St. 696, n.; Moyle, 78 Cal. 99, 12 Am. St. 22 (notice on attorney after client's death, invalid).

Agency; revocation of authority. Ans. Conts. 356-361, Mech. Ag. 200, 270, Sto. 462, 500, Whart. 93, 112. By the principal. Whart. Ag. 94, 635. Renunciation by agent. Whart. Ag. 107-637. Insanity of either party. Whart. Ag. 93, 112; Hunt; 1 Am. Lead. Cas. (Hare & Wallace), 5th ed. *Bank check; death revokes power to pay.* Zane, Banks, 122: cases.

Notice of revocation must be given. *Allegans contraria*, etc.

A power coupled with an interest survives. Hunt Case, 70 L. R. A. 135.

Guaranty; revocation by death. A revocable guaranty is revoked by death of guarantor. Aitken Co. v. Lang (1899), 106 Ky. 652, 51 S. W. 154, 90 Am. St. 263.

HUNT v. ROUSMANIER (1828), 1 Pet. 1; notes, Woollam: 53; 2 Beach, Conts. 878, 2 Pars. 353, Beach, Page, Mech. Ag. 296, Whart., Huffc.; Bro. Max. 263, 3 Gr. Ev. 361, Bisph. Eq., 2 Pom. *q. v.*, 2 Whart. Ev. 1029, 1 Per. Trusts, 2 Kent, Beach, Eq.

Cited, §§ 3, 8, 43, 113, 117, Hughes' Conts.

Hunt stated: Mistake; reformation. A creditor took a power of attorney to sell a ship, believing that it would operate as a chattel mortgage to secure him for advances made the debtor, who died, and then it was sought to have the instrument reformed. But this was refused, and upon the ground that the mistake was one of law.

See Hunt v. Rousmanier, 8 Wheat. 174; Woollam; Brown: 347; Gordon; Lansdown; Kyle: 348; Williams v. Stoll.

Courts will not make contracts for parties. Hunt; Cutter: 308; 2 Kent, 509.

Every man is presumed to know the law. 1 Gr. Ev. 20; 1 Beach, Eq. 35-63. *Ignorantia*, etc. *See* Titus, 97 Ky. 567, 53 Am. St. 426, n.; Whart. Const. 198.

Ignorance of one's right as a ground of relief. Alabama, etc. Ry. Co. v. Jones (1895), 73 Miss. 110, 55 Am. St. 488-520, ext. n.; German Ins. Co. v. Gueck (1889), 130 Ill. 345, 15 L. R. A. 835, n., 1 Sto. Eq. Pl. 110-183. *See* LIMITATIONS; Kowalke v. Milwaukee Co. (1899), 103 Wis. 472, 74 Am. St. 877, n.

HUNTSMAN v. S.: L.C. 231.

HURTADO v. CALIFORNIA: L.C. 220.

HUSBAND AND WIFE: *See* MARRIAGE; MARRIED WOMEN; 21 Cyc. 1119-1719; 7 Mews' E. C. L. 620-1308. §§ 300-303, Gr. & Rud.

LEADING CASES: *De Benham v. Mellon; Jolly v. Rees; Manby v. Scott; Montague v. Benedict; Seaton v. Benedict; C. v. Neal* (coercion).

Authority of wife to bind the husband is a question of agency. De Benham v. Mellon (1880), 6 App. Cas. 24, L. R. Q. B. 394, 2 Rul. Cas. 437, n., *Wanamaker v. Weaver* (1903), 176 N. Y. 75, 98 Am. St. 621-650, ext. n.; Cool. Torts, 38; Smith, Ans. Conts. 334-356, 21 Cyc. 1216, 1 Pars. Conts, 371, 2 Kent. 146, n., 1 Benj. Sales, 34.

De Benham stated: Mellon allowed his wife $260 for dresses and pin money, and he limited her to this. But, in violation of this, she bought goods of De Benham, who did not know of her limitations and of M.'s interdiction. He accordingly sued him, but was defeated upon the ground "that the wife's authority to bind the husband is merely a question of agency." Marriage does not give the wife authority except in case of necessity, and then only for necessaries."

Jolly, 15 C. B. (N. S.) 628 (109 E. C. L. R.), 2 Rul. Cas. 437, n., 2 Kent, 146, n., Bro. Max. 837, Chit. Conts., Ans. 356; Add.; Smith, 486, 491, 493, Whart. 84, 2 Whart. Ev. 1257, 1 Benj. Sales, 34, Gulick, 33 N. J. Law, 463, 97 Am. Dec. 728; 21 Cyc. 1218.

Jolly stated: Wife driven by necessity may contract for necessaries upon an implied agency. Eastland, 3 Q. B. D. 435, 17 Am. Law Reg. (N. S.) 412-419: cases, Ans. Conts. 356: cases, Moore, 165 Pa. St. 294, 44 Am. St. 664 (supremacy of the husband presumed).

A wife is not liable upon a book account unless she expressly agreed to pay. 2 Whart. Ev. 1256.

If she sends for a physician, the presumption is that she is pledging her husband's

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credit only, and not hers. A book account charging the wife only is insufficient. Moore. *See* Price (as to book accounts generally).

A wife living with the husband is presumed an agent to buy necessaries until the contrary is made to appear. 2 Whart. Ev. 1257. Lovell, 125 Mass. 439; Dodd, 22 Or. 250, 15 L. R. A. 717-722, n.; Priest, 51 Vt. 495, 31 Am. Rep. 695-698, n.

Manby v. Scott stated: Mrs. S. abandoned Scott without cause. M. furnished her goods against her husband's wishes, and then sued Scott, who defeated Manby.

Manby (1779), 1 Sid. 109, 1 Lev. 4, 2 Sm. L. C. 453, 11th ed. (reviews English cases), 2 Kent, Mechem, Ag., Cool. Torts; 1 Rand. Com. Paper, Pars. Conts., Chit., Add., Smith, Conts. 490, Whart. 68, 1 Benj. Sales, 32, Bro. Max. 836, 1 Kent, 437. *See* Smout.

Necessaries and family expenses. 21 Cyc. 1215-1241.

Wife's capacity to contract. Prentiss, 25 Fla. 927, 7 L. R. A. 640 (rule in various states), 3 Pom. Eq. 1121-1127 (statutes of states); 1 Chit. Conts. 223-228, Ans. Conts.

Insanity of husband as affecting wife's disability of coverture. McAnally, 109 Ala. 109, 34 L. R. A. 223-227, ext. n.

Desertion of wife; how this affects her legal status. Buford, 43 W. Va. 211, 64 Am. St. 854-871, ext. n.; Arthur, 3 Ala. 557, 37 Am. Dec. 707-714, n.

Spouses cannot contract with each other at common law, nor by statute. Hendricks, 117 N. Y. 411, 15 Am. St. 524, 3 L. R. A. 559.

"Married Woman's Acts"; effect of, upon wife's property. Kirkpatrick, 21 Ark. 268, 76 Am. Dec. 363-401, n. (with summary of statutes and decisions in each state); Hershizer, 39 Ohio St. 516, 23 Am. L. Reg. 315-329, n., 2 Bish. Mar. Women, 609, 618, 1 Add. Conts. 168, n. (Morgan's ed.), 1 Beach, Eq. 169-201, Partridge, 36 Vt. 108, 84 Am. Dec. 664-676, n. (business in wife's name).

Contracts of married women under enabling statutes. Armstrong, 112 N. C. 59, 54 Am. St. 473, n., 25 L. R. A. 188; Kantrowitz, 31 Ind. 92, 99 Am. Dec. 587-610, ext. n. *Expressio unius* is generally applied. *If valid where made they are everywhere.* Ruhe, 124 Mo. 178, 25 L. R. A. 178-188, n.; Van Voorhis.

Deeds between spouses. Wife may take under. Barnum, 110 Tenn. 638, 69 L. R. A. 353-381, ext. n.

Community property; doctrine of. Oreg. Imp., 4 Wash. 710, 19 L. R. A. 233-236, n.; Cook, 27 Tex. 457, 85 Am. Dec. 626-643, ext. n., 21 Cyc. 1633-1718.

Fraud of husband and wife upon creditors. Contracts to pay each other for services. Mich. Trust Co., 106 Mich. 384, 58 Am. St. 490, n. *Wife may be preferred as a creditor.* Riley, 116 Mo. 169, 38 Am. St. 586. Property of wife used by husband, and who, upon appearances of such ownership, gets credit, is subject to creditor's claims. Riley; *Allegans contraria*, etc. *Attacks by creditors on conveyances made by husbands to wives.* Adoue, 62 N. J. Eq. 782, 90 Am. St. 484-556, ext. n., 56 L. R. A. 817-846, ext. n.

Burden of proof of husband's debt to wife on account of property received from her. Adoue.

Husband may act as agent for wife. Wells, 112 N. C. 283, 34 Am. St. 506, n.; Wood, 88 Wis. 488, 43 Am. St. 918, n. Cohabitation does not create agency. Ans. Conts. 334. But one might be estopped to deny the relation from his conduct. Horn; Pickard; *Allegans.*

Their right to compensation for services rendered each other. Blaechniska, 130 N. Y. 497, 15 L. R. A. 213, n.

Intermixing each other's goods; confusion of each other's rights and property effects. Note, 34 Am. St. 512; Jewett. *See* CONFUSION.

Entire estate; statutes abolish. See *id.*

Marriage at common law operates as a gift to husband of wife's chattels personal in her possession. But he must reduce them to possession if he would claim them. 2 Chit. Conts. 1400-1405; Whittaker, 1 Dev. (N. C.) 310, Ewell, Inf., 343, n.: cases; Needle, 7 Ohio St. 432, 70 Am. Dec. 85-98, n., 2 Danl. Nego. Insts. 254-257, 1 Rand. 279-326, 1 Pars. N. & B. 78-89, 1 Danl. 237-251, 1 Add. Conts. 163-187.

Domicile of wife is that of husband. Hascall, 107 Tenn. 355, 89 Am. St. 952.

Equity protects wife's separate estate from. Dority.

Estoppel against wife in suits against husband for his debts. As to ownership of property. Mitchell v. Reed (1858), 9 Cal. 204, 70 Am. Dec. 647 (acquiescence in statements made in her presence binds her); Cowling, 69 Ark. 350, 63 S. W. 800, 86 Am. St. 200, n. (estoppel against); Grice, 10 Ida. 459, 69 L. R. A. 584, n.

A husband's common-law liability for his wife's torts is not changed by statute preserving to her separate estate and empowering her to manage it. Henley, 137 Cal. 373, 58 L. R. A. 941, *Contra* cases.

Husband liable for wife's ante-nuptial contracts. Cole, 25 Vt. 220, 60 Am. Dec. 258, n., 2 Chit. Conts. 1401-1405.

His promise to pay her ante-nuptial debt. Shuman, 129 Wis. 422, 7 L. R. A. (N. S.) 1048-1053, n.; Lampleigh: 301.

Marriage; effects on rights. 12 Rul. C. 729-757, n., 2 Kent, 76-93, Rand. Com. Paper, Danl., Pars. N., *supra. Coverture as a defense.* 2 Chit. Conts. 1284-1292.

Montague v. Benedict stated: Necessaries. Clandestinely furnishing a wife with jewelry beyond her station will not bind the husband. A husband is not liable for goods not necessaries supplied to wife, unless on affirmative proof that he authorized the contract. 21 Cyc. 1217.

Montague (1825), 3 B. & C. 631 (10 E. C. L. R.), 2 Sm. L. C. 433-488, 8th ed., 11th ed. (reviews English cases); 2 Kent, 146-149, Chit. Conts., Pars., Whart. 84-86; Smith, 487; Add., Whart. Ag. 11, Bro. Max. 836; Manby; Jolly. *See* Smout.

Seaton v. Benedict stated: B. supplied his wife liberally. Notwithstanding, she clandestinely bought necessaries of a milliner, who sued B. for the price, but it was held that he was not liable. A wife's power to bind the husband is a question of agency.

Seaton (1828), 5 Bing. 28 (15 E. C. L. R.), 2 Sm. L. C. 480-514, ext. n., 8th ed., 11th ed. 482-485 (reviews English cases); 2 M. & P. 66 (17 E. C. L. R.), 1 Pars. Conts. 372-376, 1 Chit. 237, Add., Smith, 487, Whart. 84. See *De Benham, Manby, Montague* and *Jolly.*

The wife's appeal is revocable. Smout.

Necessaries; what are. See INFANCY; 2 Gr. Ev. 365, 2 Benj. Sales, 26; 21 Cyc. 1241. Husband must support wife even after divorce and after allowance of statutory alimony. Edgerton, 12 Mont. 122, 16 L. R. A. 94, n. Borrowed money is not.

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Marshall, 20 R. I. 34, 78 Am. St. 841, n.
Enticing wife; alienating wife's affections. Lynch v. Knight. *See* MALICIOUS ACTS.
Right of husband to use force to restrain wife. *See* S. v. Black (1864), 1 Winston, Law (N. C.), 266, 86 Am. Dec. 436-439, n.; S. v. Rhodes (1868), Phil. Law (N. C.) 453, 98 Am. Dec. 78 (husband may chastise wife).
Separation agreements. Baum, 109 Wis. —, 83 Am. St. 854-885, Ans. Conts. 187; Foote, 54 L. R. A. 554-566, ext. n.; Whart. Conts. 90; Sawyer, 77 Vt. 273, 107 Am. St. 762, n.
Contracts of, generally. *See* Beach, Conts.; Whart. 76-93.
Crimes of wife; when husband liable for. C. v. Neal (coercion of wife to commit crime presumed, when). *Criminal law relating to.* McClain, C. L.; notes, Am. Crim. Repts.
Torts of wife; husband liable for assault and battery, although committed without his knowledge or consent. Statute has not changed the common-law rule. Henley, 137 Cal. 272, 92 Am. St. 160-170, ext. n.; Pom. Rem. 320, 321 (liable for torts relating to management of separate estate); 21 Cyc. 1491. *Contra* case, *Martin v. Robson* (1872), 65 Ill. 129, 16 Am. Rep. 578; stated, 92 Am. St. 169: cases. See *C. v. Neal* (coercion); McClain, C. L. 145-148.
Husband and wife as witnesses for or against each other; privileged communications. 3 Wigm. Ev. 2227-2245, 2332-2341; S. v. West.

HUTTON v. WARREN: Wigglesworth: 309.

HYDE v. JOHNSON (1836), 2 Bing. N. C. 776 (29 E. C. L. R.).
Agent cannot sign and bind principal under statute of frauds nor revive a barred debt. Worrall: 390.

HYPNOTISM: How regarded. P. v. Ebanks, 117 Cal. 652, 40 L. R. A. 269-280, n. *See* DRUNKENNESS; INSANITY; Bouv.

HYPOTHETICAL: *Pleading shall not be.* And. Steph. Pl. 204 (Tyl. ed. 339). *See* ALTERNATIVE; ARGUMENTATIVE; CERTAINTY; Green; Bliss, Pl. 317; Pain: 107. Courts cannot pass on hypothetical cases. Bouv. Dic. (Questions); *Fabula.* *See* INCONSISTENCY.

ID CERTUM EST QUOD CERTUM reddi potest: That is certain which may be rendered certain. 4 Kent, 462. *See* CERTAINTY; *Certum;* 67 Ill. App. 381, 588; *Falsa demonstratio,* etc.; 9 Cyc. 250.

IDEM AGENS ET PATIENS ESSE NON potest: To be at once the person acting and the person acted upon is impossible. 4 Kent, 368; Keech; Dimes: 176; Michoud v. Girod (U. S.); Newcombe v. Light, 58 Tex. 141, 44 A. R. 604 (former attorney of party cannot sit as judge).
No one can act when his integrity and his interest are in conflict is a great fundamental principle. No one can be judge of his own cause: *Nemo debet esse judex.* No trustee or agent can act when he has any personal interest. Keech v. Sandford; Michoud. "Lead us not into temptation." S. *ex rel.* Henson v. Sheppard (Mo.) (this is a principle of the unwritten constitution. The written constitution must yield to it). "Ye cannot serve God and mammon."

IDEM EST FACERE, ET NOLLE PROhibere cum possis: It is the same thing to do a thing as not to prohibit it when in your power. *See* ACCESSORY.

IDEM EST NIHIL DICERE ET INsufficienter dicere: It is the same thing to say nothing and not to say enough. A cause of action must be stated. A contract must have certainty. *See* DESCRIPTION; CERTAINTY.

IDEM SONANS: See Wiebold: 98; Pitsnogle; 1 Bouv. 974; Clary, 72 Minn. 105, 71 Am. St. 465, n.; Bliss, Pl. 146*b*; Roy; McClain, C. L. 373*a*, 605, 799; Thornily; § 312, Gr. & Rud.; 28 Ia. 699, 111 Am. St. 215.

IDENTIFICATION: Essential for *res adjudicata.* This is a question beyond the parties named on the record, the trial court and the appellate court; it is above and beyond the question of what is justice to the parties, or of variance as some codes define that. §§ 83-123, 182, 219, Gr. & Rud. The conserving principles of procedure are involved. Campbell v. Greer: 2*a*; *Id quod nostrum.*

IDENTITAS VERA COLLIGITUR EX multitudine signorum: True identity is collected from a number of signs. Bacon, Reg. 29.

IDENTITY: *Nullum simile est idem:* No like thing or the same likeness or similarity is identity. Bouv.; And. Dic. 953; *Salis,* etc.

ID QUOD NOSTRUM EST, SINE FACTO nostro, ad alium transferri non potest: What belongs to us cannot be transferred to another without our consent. Dig. 50, 17, 11. But this must be understood with this qualification: that the government may take property for public use, paying the owner its value. The title to property may also be acquired, without the express consent of the owner, by a judgment of a competent tribunal. §§ 27, 28, Hughes' Conts.; Bentley.
Two cannot contract for a third. Res inter alios acta, etc.; *Jus publicum,* etc.; *Jurisdictio est potestas,* etc. Two cannot contract to dispense with the means of safety, protection and constructive notice from public records. *See* CONSTRUCTIVE NOTICE; PLEADINGS; French v. Miller; Campbell v. Greer: 2*a*; WAIVER; CONSENSUS, etc.; CONSTITUTIONALISM; IDENTIFICATION.

IGNORANCE: Is no excuse. §§ 46, 293, Gr. & Rud. *Ignorantia facti; Ignorantia legis.*

IGNORANTIA LEGIS NEMINEM EXcusat: Ignorance of the law excuses no one. Every one is presumed to know the law. Bro. Max. 252-268; 1 Sto. Eq. 111.
This maxim must always be considered with *Ignorantia facti,* etc. It is extendedly cited and applied in Hughes' Proc., §§ 1, 5, 5*a*, 12, 17, 29, 44, 48, 79, 97, 112, 227, 239, 321; Hughes' Conts., §§ 7, 148.
Cited: Preface, §§ 27, 46, 48, 64, 77, 82, 124, 128, 163, 164, 184, 201*a*, 202, 206, 220, 262, 286, 293, 294, 295, 306, Gr. & Rud.
It is discussed and applied in many late cases: *Scott v. Ford; Utermehle v. Norment* (1904), 197 U. S. 50, 56 (citing *Hunt v. Rousmanier*); 12 Cyc. 155-158 (Crimes).
Ignorantia legis lies at the base of enforcing every right. Upon its application depends the operation of government. Every involuntary arbitration depends upon it as a cornerstone. Without its support there would only remain the voluntary recognition of justice and performance thereof.

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"If ignorance were a defence all could successfully defend with it." *Bilbie v. Lumley,* quoted 48 L. R. A. 472, 474 (voluntary payments cannot be recovered); 2 Page, Conts. 821.

It is a maxim of extensive application in Procedure. One must plead at his peril. Throughout all time the allegation (Cruikshank: 232; Dovaston: 217), the admission and the denial (Dickson: 34; Seattle Bk.: 36, 48 L. R. A. 177-210), the issue (Munday: 79 [N. J.]; Israel: 83; Fish: 12*c* [Ill.]; Crain v. U. S.) among other things are construed and determined in reference to *Ignorantia legis,* etc. It involves all the grounds and rudiments of law, also all of the conserving principles of procedure. §§ 46-71, Gr. & Rud.

"Codes have declared that all rules of procedure whether hitherto denominated legal or equitable are hereby abolished." They immediately restore the fundamentals by declaring for the statement of the cause of action, and grounds of defence, the answer and the reply. All of these provisions should be construed *in pari materia.* Dovaston: 217.

The principal maxim and that necessary universal one in procedure, namely, *Verba fortius accipiuntur contra proferentem,* cannot be abolished in a constitutionalism. For if a court can supply one material fact omitted so it can another and so on for all, consequently the clerk, a constitutional officer, can be dispensed with, also his record. If so, then what would bind or limit the court? What kind of an action or matter could it not capriciously declare jurisdiction of and proceed to bind? Then the rule that the ground of the general demurrer searches the substantial pleadings and attaches to the first fault would not be imperative, it would not mean what it says; it would be commendatory on. Upon this rule depends the application of *Ignorantia legis,* etc. Upon the rule of the general demurrer, motion in arrest and collateral attack depend the operations of a government of defined and limited powers. Where these defences do not exist there is usurpation or abuse of power; there is a judicial absolutism. There all depends on the character, intelligence and patriotism of the judge. There it is easy to see that a constitutionalism and an absolutism are separated by nothing more substantial than the forms of the law and a sheet of paper. The ceremonies of the law and the mandatory record protect life, liberty and property. Fundamental right depends upon them. Without respect for those

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ceremonies and that record the first great fundamental rule of a constitutionalism—the division of state power—would wither and fall.

It is all these matters and more that one stands charged with when he pleads or acts, whether he be plaintiff or defendant. Every presumption is against a pleader—*Verba fortius accipiuntur contra proferentem*—is strictly applied, however it may be expressed. Dovaston: 217; Harvey.

One is presumed to know the law and to plead intelligently and with necessary certainty. If he fails then his foundation gives way. Debile fundamentum fallit opus; Dovaston: 217; Pain: 107; Harvey; Davenport: 2*f*; Moore v. C.: 21; Cruikshank: 232.

Each part of the mandatory record is ever tested and throughout all time without variableness or gradation, by the principle in Dovaston: 217, by the constitutional or record rule (*Planing Mill Co. v. Chicago:* 2*d*), and the *coram judice* rule—consent cannot confer jurisdiction of subject-matter. Sto. Pl. 10, 253*a*; Windsor: 1.

There is no difference in the certainty required for the criminal and for the civil proceeding. The rationale is the same. 1 Gr. Ev. 65. The tenderness of the law for accused persons is not a distinction. Reasons for this will appear from a collective consideration of the grounds and rudiments of law and of the conserving principles of procedure, some of which are above mentioned.

The *coram judice* rule—consent cannot confer jurisdiction of subject-matter—is of great concern in procedure. It closely relates to the mystic rule—every presumption is against a pleader: Dovaston: 217; Cruikshank: 232; *De non apparentibus et non existentibus eadem est ratio:* What is not juridically made to appear cannot be judicially considered. All are presumed to know this; that they may know it and be charged with *Caveat emptor* a record is provided. It is conceived and made for the application of the foregoing rules, or maxims or cases. These are essential for the operations of constitutional law. They influence and mold all laws in both England and America; they operate as an unwritten constitution. They cannot be abolished. They are interpreted into constitutions, statutes—codes—and practice acts. Bates v. Bulkley: 225 (Ill.); Indianapolis, etc. R. R.: 223 (U. S.); Oakley: 222 (N. Y.); Trist v. Child: 214 (U. S.).

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From discussions of Bacon's maxims, *Verba fortius*, etc., are many phases of *Ignorantia legis*, etc. The student should be familiar with these maxims and their cognate maxims, cases and rules. To comprehend them is to raise and broaden the vision. They must be understood by those who think law. One familiar with the grounds and rudiments of law thinks and reads it differently than one who does not know them. These fundamentals constitute, figuratively speaking, a Procrustean bed. By them all is measured and reckoned. They are the "metwand" of the common law. Such are the great canons of construction; these are from the civil law of Rome.

Ignorantia legis, etc., is widely applied in contract. Caveat emptor has already been mentioned. From discussions of it will appear many phases of *Ignorantia legis*, etc., also discussions of mistake, undue influence and illegality. *In pari delicto*, etc. It is liberally applied in commercial paper and the equitable estoppel rules upon which it depends. *Allegans contraria non est audiendus.* Indeed it pervades all of the estoppels. It is strictly applied in estoppel by deed, also in estoppel of record—*res adjudicata.* The latter is closely allied with collateral attack, already mentioned. In all tests of a hearing, *Audi alteram partem, Ignorantia legis*, etc., and the estoppels are constantly applied. All of these subjects interlace or interweave.

Ignorantia legis, etc., from necessity is applied with harshness to officers in the discharge of duty. All must keep within their jurisdictions. *Jurisdictio est potestas*, etc.

Officers executing process are presumed to know the law. This proposition is important and is supported by very interesting and also instructive cases. Among these are *Stetson v. Kempton, Tyler v. Pomeroy* (Mass.), *Freeman v. Howe, Virginia Coupon Cases* (U. S.). From the latter may be picked several instructive points beside that officers holding process must know the law. To illustrate the latter proposition it is observed: That the bonds were issued by the state upon the condition that their coupons would be receivable for taxes. This was a law which the state afterward attempted to repudiate. A taxpayer owed a tax of $12, and tendered coupons in payment

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thereof, which the tax collector of taxes refused and thereupon seized the taxpayer's desk to satisfy the tax. For the desk an action of detinue was brought against the collector before a justice of the peace. The collector defended upon the grounds that he was authorized by the laws of the state and his process or tax warrant. Upon that defence he won in the state courts; but the taxpayer removed the cause by error to the federal supreme court, which reversed the state courts. It was held that the collector was presumed to know that the state could not impair the obligation of a contract: *Bronson v. Kinzie.* That the mandate of a state is no justification for an invasion of the rights of the citizen. This tax collector was charged with the profoundest principles of government.

The authority of the state and of his process was no protection and he was held guilty. This resulted from an application of the principal maxim which was so harshly applied that there may be government and remedy for every wrong. The remedy afforded by this case shows that it is a rivulet from a fountain which is a ground and rudiment of law. Also, that government and remedies are interactions, reciprocals or correlations.

An officer failing to return his process cannot have any justification under it. He who fails to obey the law can have no protection under the law. Six Carpenters' Case. If process on its face shows that the proceedings are *coram non judice*—subject to collateral attack—such impart notice of peril or of liability to the officer. *E. g.*, if the process is issued from a state court against an ambassador or a consul (*Telefsen v. Fee*) or if it omits the name of the judgment debtor (*Douglas v. Whiting*); or other essentials (Blair: 170). *See* SEAL. Other cases illustrating the strict liability of executive officers are found in relation to *Savacool:* 164; *Grace v. Mitchell. See* ARRESTS. Discussions of its requirements: how far it is a justification, when it is a subject of collateral attack, when it is an essential in *coram judice* proceedings and is sufficient therefor, would fill volumes. See *Stetson; Savacool; Six Carpenters' Case; Howard v. S.; Allen v. Wright; Dunlap; Ilsley;*

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Blair v. Reading, L. C. 163-169; also *S. v. Conwell; Langabier*, L. C. 174-174*a*. These cases and citations thereunder will illustrate applications of *Ignorantia legis*, etc., to ministerial officers. It is well to note and to remember that it is strictly applied, from necessity in the operations of government. *Virginia Coupon Cases.*

Inferior statutory officials are strictly judged, from necessity. Crepps v. Durden: cited, Hughes' Proc. From necessity the maxim is enforced that there may be government and its consequent remedies for wrongs. *Virginia Coupon Cases.* Its strict application against joint trespassers shows the necessity for remedies. Government and remedies are interactions; therefore it is, that a study of procedure is a study of government. Virginia; Blake v. McClung; U. S. v. Cruikshank.

Whoever is charged with a knowledge of the grounds and rudiments of law is charged with a knowledge of the profoundest principles of government. To illustrate this proposition the following observations are made:

An officer is presumed to know how a plea of justification is established; this holds him to a high and a strict accountability; this view should be well impressed, therefore it is somewhat dwelt upon.

It may be well to mention some of the requirements of a plea of justification which is enumerated as one of the conserving principles of procedure. To impress these is truly important. The requirements of the plea will quite fully indicate the limits of immunity for official acts and of the record upon which the defense depends. The matter from a justification must be gathered and established to show an authority—jurisdiction—is of the greatest concern juridically. This matter properly and exclusively belongs to the mandatory record, which must stand or fall by itself. It is not aided by the statutory record. To show an authority—jurisdiction for a justification—involves the rules of *res adjudicata*, the *coram judice* proceeding. These have nothing to do with the statutory record. A disregard of this rule will unsettle and destroy a certain and definite theory of procedure.

How to present a plea of *res adjudicata* involves a comprehension of the reasons for excluding conclusions of law, false and sham pleadings, the necessity for facts, and the exceptions to the rule that documents may be pleaded by setting forth their substance.

Assuming that pleadings or other juridical documents are at the beginning correctly drawn excludes the idea that they contain surplusage or are faulty for prolixity or can be better drawn today than they were yesterday. Therefore, to attempt to set them forth, as, generally, may be a deed or other document, would be a confession of what ought not to be and furthermore would open the way for the conclusion of law. The cases show that the latter is employed to state the substance of process. But the rule excludes conclusions of law; and especially wherever the investiture of an authority—jurisdiction—is involved. Therefore a plea of *res adjudicata* that contains a copy of nothing would fail under the plainest of rules. Nothing else would show the matter in question so well as the document itself. Applying the rule, Every presumption is made against the pleader (*Verba fortius*, etc.), it should be held bad on general demurrer, or in arrest and consequently on collateral attack.

Process issued to an officer is the mandate of sovereignty. Its commands are as brief as possible and are in the fewest and best chosen words. It is not fair to assume that it can be made more concise and intelligible today that it was made yesterday. Now, if there be one matter that must ever speak from the precise identical document in its own precise words—its own exclusive expressions—it should be the commands of sovereignty to its servitors, commanding them to enforce the laws according to the due administration of justice. Therefore a sufficient statement of a justification imperatively demands few, precise and express words. Possibly captions and other formal parts may be excusably abbreviated or stated in general words or terms. However, upon formal request these should be held insufficient and a ground for ordering an amendment. The words of the authority should be presented, and necessarily of that part that gives jurisdiction and affords the justification. This is one of the con-

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serving principles of procedure. For its foundation and support the mandatory record is conceived and provided.

One exercising the law of self-defense is charged with great responsibilities. The right to kill a malefactor who is engaged in committing a violent felony upon another who is in the peace and dignity of the state is a dilemma requiring quick action directed by clear perceptions of natural right and of duty. The exercise of the law of self-defense is closely guarded by the principal maxim. One must know where to begin and how to conduct the defense, what means to employ and what to avoid, and where to stop. Uncalled for and excessive resistance must be avoided. An authority given by the law must not be abused. The abuse of an authority given by law makes one a trespasser from the beginning. This is a strict and harsh rule of which all stand charged with knowledge. Six Carpenters' Case: 165.

For reasons already mentioned, it seems well to observe that the presentation of a justification requires a copy of the essential or at least the essential parts involved. Upon principle conclusions of law will not do nor will the pleader's conclusion of what is the substance of the record; this would be a conclusion of law. The record ought to be set forth *in hæc verba.* There are cases where pleading by copy will not do. For precise matters like investing an official with authority conclusions of law and general modes of allegation will not do. J'Anson v. Stuart. *E. g.*, a plea of former jeopardy *must set forth a copy of the indictment* upon which the former sentence rests. To plead it by substance would certainly be stating conclusions of law; these could not be compared letter by letter and word by word with the later record—the subsequent indictment—which comparison must be made. *Burton v. U. S.; C. v. Roby.* Analogous reasons demand that a copy of process appear in a plea of justification. *Ubi eadem ratio ibi idem jus.*

It is due to confess that the foregoing views are not reconcilable with *Deitsch v. Wiggins.* But this case is peculiar; it stands for authority to mix the uses of the statutory record with those of the mandatory record. This cannot be admitted for reasons elsewhere expressed. The effect of

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process for a justification must appear from its face from the start; it is for the whole public and all are to take notice of it; to all it must technically and solely speak; it is not a matter of augmentation or diminution, by antecedent, concomitant or subsequent matters. It must speak and speak to all alike from within its own four corners is the general and the necessary rule. Like the indictment or other pleading it must give or confer the authority or jurisdiction to proceed.

Generally no mandatory record is sufficient which is dependent upon the statutory record; the latter was not conceived for that support. It depends upon a statute and it is always construed according to the intention of the statute. *Verba intentione.* A proceeding that is *coram non judice* until the statutory record is filed is open to many attacks; this proposition should be considered from the conserving principles of procedure. *Quod ab initio.*

The ambassador and consul upon whom devolves the peace of nations are presumed to know the law. They are creatures of international law and they must conform thereto. Not even they are above or out of the law.

One dealing with commercial paper is charged with grave responsibilities. He must know the principle in *Miller v. Race* (money passes on delivery), also *Swift v. Tyson* (*bona fide* purchaser). *Caveat emptor*, already mentioned, applies in many contract relations. It always means that one knows his own business, what he wants and will suit him; his choice as to these matters binds him; it is final and conclusive.

The intelligence required of officials is not less than that required of others; indeed, it seems the greatest knowledge is required of the former. To illustrate: The knowledge that can assemble and set up the matter constituting a plea of justification is not less than that required of the other classes above mentioned.

In crime *Ignorantia legis*, etc., and *Ignorantia facti excusat* have most extended and interesting discussions. Many aspects of them are seen from explications of that basic maxim in criminal law: *Actus non facit reum nisi mens sit rea:* Act and intent must concur to constitute crime.

Ignorantia.—Coke made this maxim very prominent in his fourth institute.

Crime depends on criminal intent in all cases except statutory offenses where it is excepted, as is well presented in *P. v. Robey* (agent selling whiskey on Sunday); *C. v. Mash* (bigamy case); *R. v. Prince* (abduction case); *C. v. Neal* (coercion); *Levett's Case* (ignorance of fact will excuse). *R. v. Esop is widely cited to illustrate the rule.* His plea was that his unnatural and revolting licentiousness was the custom of Bagdad, and that he did not know it was forbidden in England. His plea of ignorance was unavailing.

Every one is presumed to know the laws of the country wherever he may be. It is gross neglect to be ignorant of the law. "Turn to the right is the law of the road" in some countries but not in all; wherever one should turn to the left he must know it at his peril. Ships passing or crossing ways must know maritime rules and regulations at their peril.

Contract involves Ignorantia legis, etc., in many relations, as will appear from the following cases: *Swift v. Tyson* (commercial paper); *Williams v. Stoll* (signing contracts); *Hunt v. Rousmanier* (contract); *Webb v. John Hancock Ins. Co.* (statutes); *Bright v. Allan*, 203 Pa. 394, 93 Am. St. 769, n.

The stockholder is presumed to know that each state wherein his corporation does business may superimpose accumulative liabilities upon him to any extent a statute may prescribe. *Expressio eorum.*

Ignorantia legis, etc., is liberally applied in tort, as appears from discussions of *Volenti non fit injuria* (one who invites his injury cannot complain of it), also of *Nullus commodum capere potest de injuria sua propria* (no one can take advantage of his own wrong).

The grantee of realty must take notice of possessory rights; also of the effect of an absolute deed of conveyance attended with any other fact that will indicate that such deed was merely to secure the payment of money. Things are not always as they speak or seem.

The action of deceit presents contract features of the maxim, as will appear from Chandelor, Pasley and *Laidlaw.* They also involve *Caveat emptor* and the law of warranty.

Every one is presumed to intend the natural, direct and probable consequences of his act is a rule that sometimes involves phases of the principal maxim. That important presumption is well presented in the widely known and cited *"Squib Case": Scott v. Shepherd.* *See* EVERY.

One is presumed to know that if he aids or abets a wrong in any way or participates in it in the least he will be viewed and held as a joint wrongdoer, wherein each is liable for the whole. *Kirkwood v. Miller.*

One aiding or promoting the commission of a wrong, whether mere tort or crime, is liable for the wrong done. In crime this involves discussions of tacking and collateral intent. Spies v. P. (Anarchist case); P. v. Lawrence (1904), 143 Cal. 148, 68 L. R. A. 193-223, ext. n.

Ignorare legis est lata culpa: To be ignorant of the law is gross neglect. Bartolus on Cod. 14. *See* CULPA.

IGNORATIS TERMINIS, IGNORATUR et ars: Terms being unknown, the art also is unknown. *Cited*, pp. 11, 14, 19; § 8, Hughes' Proc.

Terminology essential. *Nomen est quasi rei notamen; Nomina sunt notæ rerum.* See *Nomina; Non ex opinionibus*, etc.; *Ad recte*, etc.

IGNOSCITUR EI QUI SANGUINEM suum qualiter redemptum voluit: The law holds him excused who chooses that his blood should be redeemed on any terms. Dig. 48, 21, 1.

ILLEGALITY: §§ 133-136, Hughes' Conts. See *Ex causa turpi*, etc.; *In pari delicto*, etc.; Holman v. Johnson; Brooks v. Martin; Trist v. Child; CHAMPERTY; BARRATRY; MAINTENANCE; 9 Cyc. 465-577.

Illegal defenses need not be pleaded. Holman v. Johnson; *Fabula non judicium;* Field v. Mayor; Whitworth v. Thomas; § 69, Hughes' Conts.

Illegal considerations. §§ 88-111, 133-236, Hughes' Conts.; Ans. Conts. 177-203; 2 Beach, 1415-1610; Smith, 206-306.

In pari delicto, etc.; Greenh. Pub. Pol.; Eddy on Combinations, Monopoly, Pools, Trusts, etc.

ILLEGITIMACY: An illegitimate child can inherit from nobody, nor can he transmit except to heirs of his own body. Alabama R. R., 78 Miss. 209, 51 L. R. A. 836

Mother of illegitimate cannot recover for wrongful act causing child's death. Robinson v. R. R. *See* INFANTS; *Actio personalis*, etc.

ILLINOIS: Conflict of cases. *See* Israel.

The general issue and the growth of waiver in this state have largely contributed to making every case a law unto itself. Thus, the common count and its statutes of amendments and jeofails have constantly deranged and impeded. The principles of the Roman, English and federal and the great cases of an earlier generation give the Illinois courts little or no concern. Reason, harmony, symmetry and congruity are not so much looked after as is, what did the court say in the *last case* of *our* kind, and whether or not it will immediately change its views. See *Harrow v. Grogan.* The importance of the "late Illinois case" is much emphasized. *See* Preface, DATUM POSTS, also GROUNDS AND RUDIMENTS.

The situation is very much like that of the federal supreme court in regard to questions of due process of law in cases from the highest court of a state, and how this shall be made to appear.

In both of these jurisdictions it is *apropos* to ask if the mandatory record in itself is ever sufficient to present a cause for review. Wherever this is a question there are serious, indeed fundamental, disturbances. There is a disregard of what is elsewhere defined for brevity as the "constitutional" or "record"

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rule, the "mystic" rule and the "*coram judice*" rule. A disregard of these rules and their cognates will unsettle any system of procedure. Wherever pleadings can be waived there the mandatory record in itself is not sufficient to present any case for review. There a cause may be presented for review upon the statutory record alone. Logically these propositions are true where generalities, aider and waiver are carried to the extremes shown by the cases. These show the general issue will cure the omission of a material allegation, that pleas, answers, replications and other essentials can be waived; that variances may be disregarded; the discussions of pleadings are not from the conserving policies of procedure but from the little, narrow and misleading definition that they are primarily to apprise the adverse side of what he must meet at the trial. From this of course it is easy to see he can waive them if he chooses; that unless he objects and excepts and presents and reserves these in the statutory record, then he has waived; that he cannot conceal a matter and be silent and first raise it as a ground for reversal in an appellate court. Aider by conduct and pleading over is carried to such extremes as to threaten the utility of the mandatory record, which is not yet well defined in 350 volumes of reports.

Maxims and old notable cases are rarely cited and discussed as formerly, and as they were in *Wright v. P.*, Breeze, 104; Langabier: 174*a*. It seems late cases, variations, inferiors and matter of mere accumulation are most sought. Failure to cite well known old precedents and cases greatly augments the difficulty of learning and keeping abreast with the career of the courts. It is possible to prevent anyone from knowing the rule of any case until the court has disposed of it. *Stare decisis* is not greatly respected in Illinois.

The foregoing propositions should be considered in reference to the following cases: *Israel v. Reynolds, Chicago v. P.* (1905), 215 Ill. 235 (replication cannot be waived); *see* Hend. Eq. Pl. 521, 522 (pleas, answers and replies can be waived): cases; *Jackson v. Sackett*, 146 Ill. 646 (answers can be waived); *Hitchcock v. Haight*, 7 Ill. 604 (verdict cannot aid an immaterial issue); *Ill. Co. v. Hanson*, 195 Ill. 106; *Sargent Co. v. Baublis*, 215 Ill. 428 (general issue aids a defective allegation). The following cases

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connectedly considered will present a great conflict:

Harrow v. Grogan; Bowman v. P.; Wabash R. R. v. Friedman: 137; Guedel v. P.: 74*a*; Limouze v. P., 58 Ill. Ap. 314; Bromley v. P., 150 Ill. 297; Humpeler v. P., 92 Ill. 400; Dorn v. Farr; Adams v. Gill. *See* § 30, Hughes' Proc.

A *recovery must be secundum allegata et probata* is held with great strictness in some of these cases and for varying reasons. When held in equity it is so strongly emphasized that the case can be cited to show that the universal rule is not so applied in other relations as in *Lang v. Metzger*, 206 Ill. 475, 478; Sto. Pl. 10; *Planing Mill Co. v. Chicago*: 2*d*. It is overemphasized and for a misleading reason in Guedel v. P.: 74*a*; for another reason in *Wabash R. R. v. Friedman*: 137.

Many cases show that the maxim *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged) is disregarded, also, what is not made juridically to appear cannot be judicially considered. Pleadings are not uniformly comprehended and discussed as the juridical means by which a court is invested with jurisdiction of a subject-matter to adjudicate it. Franklin Lodge v. P.

Whether or not the *ad damnum* limits the recovery is a changeful question, also the presumption of regularity. Harrow v. Grogan; Rice v. Travis.

It is a question if pleadings limit the court as it formerly held in *Fish v. Cleland*. Franklin Lodge. *See* ALLEGATIONS.

Blackstone is frequently cited, and there is found among his followers the condition stated in §§ 15-21, Gr. & Rud. But greater staples have been Chitty and Stephen. From all these authorities there is sadly lacking a comprehension of the conserving principles (§§ 83-123, Gr. & Rud.). It is not easy to learn from the 300 Appellate Court Reports of the state that there is such a thing as the prescriptive constitution. This can only be picked and argued and construed out as in Missouri.

At least five matters are giving the Illinois, Indiana and Missouri lawyers a great deal of trouble. These are:

1. The general acceptance of the view that the substantial pleadings can be dispensed with by consent or waiver.
2. The validity of extravagant and indefensible statutes of Amendments and Jeofails. *See* Dovaston: 217.
3. That the general issue is a helpful means in the due administration of justice, notwithstanding that pleadings are to limit issues and narrow proofs *inter alia*. *See* CODES.
4. That procedure is purely a matter of legislative concern, and is whatever the legislature may hand out from session to session.

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This makes the "late case" in great demand. The decisions and briefs show that fundamental maxims and Mansfield's great cases, such as *Rushton:* 5, *R. v. Wheatley:* 19 and *Robinson v. Raley:* 45, are not understood or regarded. Some of the late cases are abstracted like this: "If a general demurrer to the narr. is overruled, and the case is tried on its merits then the objection raised by such demurrer is waived." So it appears that the distinctions between the general and special demurrer are abolished. It seems well to ask, whence "the case" appears, if the pleading is obnoxious to the general demurrer; also to note, that all matters of a general demurrer cannot be raised on a motion in arrest. *See* McAllister v. Kuhn: 3; § 242, Gr. & Rud.; U. S. v. Cruikshank: 232; INDICTMENTS.

5. The distinctions between the mandatory and statutory records are not now as well understood as formerly. Planing: 2*d*. In this alone will be found enough to disrupt and dismember jurisprudence. When the philosophy of the law is lost the law is lost.

The Municipal Court Act for Chicago provides for a crude rudimentary code. It is unlike Bacon's one hundred ordinances and David Dudley Field's formulation; these codes were conceived from the conserving principles of procedure (§§ 83-123, Gr. & Rud.). But the Chicago code or Practice Act appears to have only in view the interests and wishes of the parties named upon the record, *e. g.*, the Bill of Particulars is made the original and principal pleading to invest the court with jurisdiction; this Bill of Particulars, it is enacted, shall be held sufficient if it "apprise the defendant" of what he is to meet at the trial. Of course in construing this command of the statute the courts will construe from tests of *res adjudicata* and of collateral attack, also requirements for appellate procedure. 66 Cent. L. J. 347. Bates v. Bulkley: 225; Fish v. Cleland: 12c; Sto. Pl. 10; U. S. v. Cruikshank: 232; 66 Cent. L. J. 441-442.

The language of this act is calculated to give more trouble than the language of the code, which requires what the complaint (petition)

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shall contain. Green v. Palmer: 90. *See* CODES.

It is also provided that the provisions of the act shall be liberally construed in furtherance of justice between the parties. This is the usual companion clause attending the above quotation.

With this crude and bewildering language is to be considered a statute of Amendments and Jeofails as extensive and revolutionary as a like act in Missouri. Dovaston: 217; Rushton: 5; J'Anson: 91; Chap. VII, § 6, par. 9, Ill. Statute (1874).

The due administration of the laws in the states above mentioned is disrupted and dismembered for want of broad construction. This from misconception and narrow vision invites the condition already indicated in relation to codes and construction. Where the prescriptive constitution is denied there the soil is ready for all kinds of sowing; all kinds of due process of law. *See* Paraiso v. U. S.

Benedicta est expositio quando res redimitur a destructione.

ILSLEY v. NICHOLS: L.C. 169.

IMMATERIAL MATTER: Bouv. Dic.

IMMORALITY: Effect upon contract. Ans. Conts. 187, 192. See *In pari delicto;* Keech; Michoud; ILLEGALITY; *Fabula non judicium.*

IMPAIRING THE OBLIGATION OF contracts: Dash: 237*a*; Dartmouth; Bronson: 238; 1 Bouv. Dic. 948-988; 35 Wis. 565; Virginia C. C.: 285*a*; 3 Page, Conts. 1740-1790.

Cannot be indirectly done as by abolishing a county. Courts cannot permit themselves to be deceived. Graham v. Folsom (1905), 200 U. S. 248.

This does not apply to retrospective decisions. Central Land Co., 159 U. S. 103, 77 Am. St. 268; Hanford: 86.

Existing contract rescinded by statute forbidding its in futuro performance. Packers' Rebate Cases (1908), — U. S. — (dissenting opinions).

IMPEACHMENT OF WITNESSES: See *Falsus in uno;* Allen v. S., 28 Ga. 395, 73 Am. Dec. 760-778, ext. n.; 1 Gr. Ev. 461-469.

IMPERTINENCE IN PLEADING: Remedy for. Sto. Pl. 266, 867. *See* Bouv. Dic. (scandalous matter).

IMPLICATIONS: Annex themselves. See *Expressio eorum; Accessorium non ducit; note,* §§ 27, 147, Hughes' Conts.; Dobson.

Right to fill blanks in commercial paper. Angle.

Implied facts need not be pleaded. Bliss, Pl. 176; §§ 11, 86-90, 111, 115-119, 139, 147, 149-152, 157, 188, 205, 207, 209, 225, 234, Gr. & Rud.; *Omne majus continet in se minus.* §§ 28, 40, 43, 44, 76, 186*a*, 254, Hughes' Proc.

IMPLIED CONTRACTS: 2 Whart. Conts. 707-721. *See* Cutter: 308; QUASI CONTRACTS; 1 Beach, Conts. 639-667; Boston Ice Co.: 320; Clayton; 2 Page, 771-843: Implied, Quasi-Contracts. § 147, Hughes' Conts.

Implied.—

Necessaries for infants and wives; to support infants. Porter v. Powell. *See* NECESSARIES; INFANTS.

Indorsing a note without recourse nevertheless warrants that it is genuine and unpaid. § 134, Hughes' Conts. See *Caveat emptor.*

Implied facts need not be pleaded. Bliss, Pl. 176; Bouv. Dic. (Implication).

IMPOSSIBILITY: See *Lex non cogit ad impossibilia;* Robinson: 309; Taylor: 310; Bouv. Dic.; Baily v. De C.; Ans. Conts. 80, 81, 129, 280-285, 320-325; 1 Beach, 216-243; Bish. 577-600; Whart. 296-331; 3 Page, 1362-1381.

Parties may contract for. § 4, Hughes' Conts. *See* Gilpin v. Consequa; Baily v. De C. § 69, Gr. & Rud.

Entire contract to rebuild made impossible of performance; loss falls on the owner. *Cujus est dominium;* Hallett: 308*d*.

Avoids contract, when. §§ 70, 112, Hughes' Conts. When a defense. Baily v. De C. *See* INFANTS.

Party rendering performance impossible is liable. Peck v. U. S.; *Sub, Lex non cogit.*

An impossibility cannot be contracted for, is a general rule. But the cases are rare that have flatly decided the question. We know of none. Wherever cases like *Thornborow:* 333 are upheld it is difficult to see how the general rule can exist. It must also be borne in mind that in the law of attempts in criminal law it was long held that there must be a possibility to commit the crime—the possibility was an essential element; *e. g.,* if one had no money in his pocket, then this was a defense for one who attempted to pick a pocket. And the same rationale applies in an attempt to commit abortion, where the woman was not pregnant. But the weight of authority is against these views. The impossibility idea lost its place. R. v. Collins.

In contract law it is difficult to see how one could escape liability where he received benefits to consummate an undertaking deemed merely impossible. If one contracted to do such a thing, or else received the consideration or a part of it, and this was sued for, it is inconceivable how the suit could be defeated upon the sole ground that the promisor undertook an impossibility. 1 Beach, Conts. 216. See §§ 4, 70, Hughes' Conts.

In procedure, impossible things are excluded. Reasons for this will appear from a consideration of *Fabula non judicium.* An alternative pleading states at least in part a myth or sham or a different case, and often an impossible case because of the repugnancy of statement. Such pleadings are void. They are offensive in the due administration of justice. Pain: 107; *Ex facto oritur jus;* Dovaston: 217. There must be a subject-matter that jurisdiction may attach to something. *Fabula.*

Kinds of. Whart. Conts. 296, 297.

A thing not in esse (not in existence) is not a subject of sale. Whart. Conts. 298.

Impossibility and vain and fruitless things are extendedly discussed. 66 Cent. L. J. 367-370.

Impossibilium nulla obligatio est: There is no obligation to perform impossible things. Dig. 50, 18, 185; 1 Pothier, Obl., pt. 1, c. 1, s. 4, § 3; 2 Sto. Eq. Jur. 763; Bro. Max. 228; Baily v. De C.

Impossibility.—

Impotentia excusat legem: Impossibility is an excuse in the law. Coke, Litt. 29; 243-251, 8th ed. *See* IMPOSSIBILITY.

IMPRISONMENT: Bouv. Dic. False imprisonment. 9 Mews' E. C. L. 702-711. A form of duress. Ans. Conts. 164.

IMPROVEMENT: Compensation. Bright; Bouv.; 12 Mews' E. C. L. 777; 12 Cyc. 1-34.

IN AEQUALI JURE MELIOR EST CONDITIO possidentis: When the parties have equal rights, the condition of the possessor is the better; or, where the right is equal, the claim of the party in equal possession shall prevail. Bro. Max. 712-728; Mitford, Pl. 215; Jeremy, Eq. 285; 1 Maddock, Chan. Prac. 170; Dig. 50, 17, 128; Bro. Max. 724; Jones (compounding crime).

Max. No. 10; *cited,* §§ 5, 147, 149, 154-157, 315, Hughes' Proc.; § 307, Gr. & Rud. See *In pari,* etc.; L.C. 358-372; ILLEGALITY.

INCEST: McClain, C. L.; S. v. Thomas (1880), 53 Ga. 214, 4 Crim. Def. 40; Bouv.; And. Dic.; 2 Cyc. 42-60; Tagert v. S. (1905), 148 Ala. 88, 111 Am. St. 17-31, ext. n.

INCIDENTS: Attach to the principal thing. See *Expressio eorum; Accessorium non ducit,* etc.; McCulloch: 147; Logan v. U. S.: 249; Mohr; And. Dic.; § 253, Hughes' Proc. Remedies attach to rights. Ashby: 273. *See* GOVERNMENT. § 126, Gr. & Rud.

Incidents annex themselves. The law enters into the contract and becomes a part of it. Bronson; 94 Tex. 641, 646 (*Ut res magis valeat,* etc.); § 147, Hughes' Conts. *See* APPURTENANCES; EASEMENTS; Pinnington.

INCONSISTENCY: Disfavored and repressed. *Allegans;* Baily: 44; Horn v. Cole; Pickard; Smith: 156; *Falsus in uno,* etc.; REPUGNANCY.

One cannot deny generally, and still admit by a particular statement. Dickson: 34; *Verba generalia,* etc.; Crater. *See* ILLUSTRATIONS, *sub* REPUGNANCY; HYPOTHETICAL.

INCONSISTENT DEFENSES: Limitations. Dickson: 34; Ansley v. Bk.; Hayes (Colo.); Hannem; Graver: 103; Brown v. Bell. *See* REPUGNANCY. When permissible. 11 Mews' E. C. L. 831; Pain: 107.

INDEBITATUS COUNTS: Their history. Ans. Conts. 364, 365. Their object. *Id.* 277, 278.

INDEMAUR V. DAMES (1867), L. R. 2 C. P. 311, 1 H. & R. 243; 2 Smith, Cas. Torts, 296, 1 Thomp. Neg. 283, Bigl. Lead. Cas. Torts, 668 Cool., 46 L. R. A. 33-122, Mech. Ag., Hutch. Carr., Gould, Wat., Bro. Max. 270, 387, Shear. Neg., Whart., Wood, Nuis., 1 Add. Torts, 228-258, Busw. Inj. 65.

Cited, § 296, Gr. & Rud.

An elevator shaft on premises must be carefully kept; if negligently kept, and a licensee, e. g. a gas inspector, falls in and is injured, the owner is liable. Redigan, 155 Mass. 44, 31 Am. St. 520, n.; 14 L. R. A. 276; Heaven (licensee must take premises as he finds them); Bro. Max. 270. No notice of danger is due to a trespasser. Stevens, 155 Mass. 472, 15 L. R. A. 472; Benson, 77 Md. 535, 39 Am. St. 436, n., 20 L. R. A. 714, n.

Unfenced slack pits; injuries to child. U. P. R. R. v. McDonald, 152 U. S. 262; Ritz, 45 W. Va. 262, 43 L. R. A. 148: cases (liberal rule for owner); Lorence, 13 Wash. 341, 52 Am. St. 42, n.; Texas Fair,

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56 C. C. A. 499-504, n. (falling seats injuring spectators). *Turntable cases.* Biggs, 60 Kan. 217, 44 L. R. A. 655.

Children; injuries to. Lynch v. Nurdin, *sub* Scott v. Shepherd; Louisville R. R., 96 Ky. 99, 10 Am. R. R. & Corp. Rep. 280-293, n. (child injured); Hughes, 71 N. H. 279, 93 Am. St. 518, n. (no duty due trespassers); *Volenti*, etc.

Trespassers; cannot recover. Bird v. Holbrook; *Sic utere*, etc.

INDEMNITY: Bouv. Dic. Contracts; when valid. Merryweather; Lovejoy, 86 Am. St. 548-558. Distinct from guaranty. Ans. Conts. 59. Marine and fire insurance are contracts of. *Id.* 180.

INDEPENDENT CONTRACTOR: Hilliard, *sub* McManus; Hay, 76 Am. St. 375-428, ext. n.; Bouv. Dic.

INDEPENDENT PROMISES: What are. Ans. Conts. 287. Absolute promises. *Id.* 288-290. Divisible promises in respect of performance. *Id.* 290-292. Subsidiary promises. *Id.* 292-295. Warranty a subsidiary promise. *Id.* 304.

INDEX ANIMI SERMO: Speech is the index of the mind. Bro. Max. 622. *See* CONSTRUCTION; NAMES; § 236, Hughes' Proc.

INDIANA: Decisions of, often conflict upon fundamentals. *See* NEW YORK; ILLINOIS; MISSOURI; COLORADO; Munday: 79: cases; Hubler; THEORY OF THE CASE. *Cited*, § 30, Hughes' Proc.

An answer cannot be attacked upon appeal for the first time for the reason that it is defective in substance as a complaint may be, for the reason that the code provides that such defects of a complaint shall not be waived. Unger v. Mellinger (1906), 37 Ind. App. 639, 117 Am. St. 348: cases. This case may be cited to support the view that procedure is given by statute (see Preface, Grounds and Rudiments) and does not arise from the principles of the common law; it attacks *Verba fortius*, etc., and its cognate maxims. It does not support the argument for the conserving principles. §§ 83-123, Gr. & Rud.; § 28, Hughes' Proc. It stands for this view, that the answer is a creature of waiver; that an answer may be waived; that if objections to it are not apt, precise and certain it is waived, exactly like any other waivable matter or proceeding.

INDIANAPOLIS R. R. v. HORST: L.C. 223.

INDICIA: Of ownership will pass title to an innocent purchaser. Bentley; Bouv. Dic.

INDICTMENTS: Are required by the conserving principles of procedure. §§ 83-123, Gr. & Rud.

Are a pleading; are defined therewith and thereby. Pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it. Guedel v. P.: 74*a*; Sto. Pl. 10; C. v. Bean: 226; U. S. v. Carll, 105 U. S. 611, U. S. v. Cruikshank: 232: cases; Paraiso v. U. S. *See* Bish. Crim. Proc.; McClain, C. L.; Bouv. Dic. 1018-1020; And. Dic.; 4 Mews' E. C. L. (criminal law); 22 Cyc. 57-475; 3 Cyc. 993-1003 (arson); 6 Cyc. 199-226 (burglary). *See* PREFACE, Datum Posts, also of Gr. & Rud.

All pleadings must be certain. They must meet the requirements of four leading maxims, which are:

Indictments.—

1. *De non apparentibus et non existentibus eadem est ratio:* What is not juridically presented cannot be judicially decided. Campbell v. Porter: 2: cases; Rushton: 5: cases; R. v. Wheatley: 19: cases; U. S. v. Perez: 69: cases; Guedel v. P.: 74*a*: cases; C. v. Bean: 226: cases; U. S. v. Carll, 105 U. S. 611; U. S. v. Cruikshank: 232: cases.
2. *Frustra probatur quod probatum non relevat:* It is vain to prove what is not alleged. Guedel v. P.: 74*a*; Bristow v. Wright: 135: cases (*allegata et probata* must agree). See *Expressio unius.*
3. *Verba fortius accipiuntur contra proferentem:* Every presumption is against a pleader. Moore v. C.: 21; Dovaston: 217; U. S. v. Cruikshank: 232: cases.
4. *Quod lex non vetat permittit:* What the law does not forbid it permits. § 163, Gr. & Rud. *See* EX POST FACTO LAWS.

Must be certain to meet the requirements of the conserving principles of procedure (§§ 83-123, Gr. & Rud.) as well as "to apprise the defendant" of what he is to meet at the trial. Guedel v. P.: 74*a*; §§ 238, 294, Gr. & Rud. *See* CERTAINTY; ALLEGATIONS; CONCLUSIONS OF LAW.

Certain pleadings essential in a government of limited and defined powers. §§ 119, 123, 163, 238, 294, Gr. & Rud. *Verba fortius*; CODES; Preface, Gr. & Rud.

In res adjudicata rules is found one of the high tests. §§ 171-200, Gr. & Rud. *See* RES ADJUDICATA; CERTAINTY; Paraiso v. U. S.

Appellate procedure also requires certainty. Martin v. Hunter's Lessee: 246. *See* APPELLATE PROCEDURE; IDENTIFICATION.

"Then and there," meaning and uses of. Waverton: 70; C. v. Snell, 189 Mass. 12, 3 L. R. A. (N. S.) 1019-1034, ext. n.

"In language of the statute," when this is sufficient. C. v. Bean: 226: cases; U. S. v. Carll, *supra;* 99 Me. 329, 105 Am. St. 278; U. S. v. Cruikshank: 232.

Constitutions expressly require certainty; they reaffirm the requirements of the prescriptive constitution. *See* CONSTITUTIONAL LAW; CODES; U. S. v. Cruikshank: 232: cases. §§ 159, 239, 240, Gr. & Rud. *Provisos, how pleaded.* C. v. Hart: 227.

Indictments are judged by the above maxims like all other pleadings. Indictments are not more strict than other pleadings. Rushton: 5; Dovaston: 217; *Cf.* R. v. Wheatley: 19: cases; Moore v. C.: 21: cases. *See* ALLEGATIONS; CONCLUSIONS OF LAW. §§ 190, 191, Hughes' Proc.

Rushton v. Aspinall: 5, applies to all pleadings and all are alike as to certainty. Waverton: 70; Waters: 71; R. v. Wheatley: 19; Moore v. C.: 21; Bartlett: 6.

A crime must be described. R. v. Wheatley: 19; U. S. v. Cruikshank: 232. *See* IDENTIFICATION.

The right record must show its return into court, but it is held that pleading to it is a sufficient showing of that.

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The mandatory record should show the necessary facts. Hurtado: 220.

Omission of "contrary to the laws of the said state, etc.," is bad. Hardin v. S. (1898), 106 Ga. 384, 71 Am. St. 269, n. And cannot be waived. Cox v. S. (1880), 8 Tex. Ct. App. 254, 34 Am. Rep. 746.

Essentials of. *See* CRIMES; Cruikshank; Wheatley; *De non apparentibus,* etc.; *Debile fundamentum,* etc.; *Jurisdictio est potestas,* etc.

If indictment is defective, court will sua sponte notice the defect. Campbell: 2.

Amendment of. S. v. Barrett (1903), 75 Vt. 202, 98 Am. St. 813 (informations may be amended); Bro. Max. 629. *See* AMENDMENTS.

INDORSEE: Rights of. Ans. Conts. 227.

Where *bona fide* and for value. *Id.* 228; Swift. *See* COMMERCIAL PAPER.

INDORSEMENT: Special. Ans. Conts. 227. In blank. *Id.* 227. Of bill of lading. *Id.* 76, 230.

INFANCY: *See* INFANTS. Defense of. 2 Gr. Ev. 362-368. Craig. Is abatement, and is waived if not pleaded. McMullin, 92 Me. 336, 69 Am. St. 510, n.

INFANTICIDE: Sub U. S. v. Holmes. Procedure. McClain, C. L. Form of indictment. Waters: 71.

INFANTS: LEADING CASES: *S. v. Clarke* (when of age); *R. v. York* (criminal liability); *Gilson v. Spear* (liable for torts); *Peters v. Fleming* (may contract for necessaries); *Holt v. Clarencieux; Hunt v. Peake* (not liable on marriage contract that binds adult); *Craig v. Van Bebber* and *Trueblood v. Trueblood* (deed of, void); *Zouch v. Parsons* (may disaffirm deed); *Keane v. Boycott, Holmes v. Blogg, Porter v. Powell* (parents bound to support); *Eyre v. Shaftsbury* (custody of children).

Contracts of infants. See *Craig v. Van Bebber;* §§ 55-60, Hughes' Conts.; Smith, 307-326; Whart. 29-75, Mews' E. C. L. 1329-1526; 22 Cyc. 503-712 (general *resume*). §§ 301, 305, Gr. & Rud.

Who are infants. § 59, Hughes' Conts.

Are of full age on the day preceding their 21st anniversary. S. v. Clarke (1840), 3 Harr. (Del.) 557, Ewell, L. C. Inf., 2, n.; Herbert v. Turball (1663), Raym. T. 84, 1 Keble, 589, Siderf. 162, pl. 17, Ewell, L. C. 1; Wells, 6 Ind. 447, Ans. Conts. 105, n.; Montoya, 7 N. M. 289, 21 L. R. A. 799; Ross, 85 Tex. 172, 16 L. R. A. 542, n.

Criminal liability of; rules. R. v. York; Godfrey, *ante;* R. v. Owen; McClain; C. L. 149-153.

Torts. Infants are liable for, like adults. Non-age is no defense for a tort. Squib Case; *Gilson v. Spear;* Vosburgh v. Moak; Lowery v. Cate (1901), 108 Tenn. 54, 57 L. R. A. 673-689, ext. n., 91 Am. St. 744; Cool. Torts, 120-131, 2d ed.; Huffc. Ag. 237; § 63, Hughes' Conts.

Can only contract for necessaries. Peters.

Marriage contracts. Males may consummate at fourteen, females at twelve. Such contracts consummated before these ages are voidable upon attaining those ages. Bro. Max. 512, 2 Gr. Ev. 460, 2 Kent, 78. But they can make no enforceable or legal contract of marriage before attaining majority. Adult contracting marriage with an infant is bound, but the infant is not. *Holt v. Clarencieux* (1732), 2 Strange, 937, *id.* 850, 1 Barnard, K. B. 247, Ewell, Lead. Cas. Inf. 50, 1 Lang. Cas. Conts. 397, 163 Mass. 363, 47 Am. St. 464 (girl of fifteen recovered against man of twenty-two for breach of promise. He was bound but she was not, which opposes the rule in *Cooke v. Oxley,* which is that both sides are bound or neither); *Hunt v. Peake* (1826), 5 Cowen (N. Y.), 475, 15 Am. Dec. 475, 2 Kent, 243, 3 *id.* 437, n. (infant not liable on marriage contract). Seduction, may commit. S. v. Brock, 186 Mo. 457, 105 Am. St. 625-628, n.

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The notes to the Craig Case review most of the leading cases, and Vasse v. Smith, Tucker v. Moreland, Peters v. Fleming (necessaries), and *Zouch v. Parsons.*

Craig stated: A wife, aged sixteen, with her husband, conveyed land to V. Afterwards she sold it to another, and this ipso facto was held a disaffirmance. Without returning the purchase price paid her by V., she sued in ejectment for the land sold him and recovered.

This case with its notes is most exhaustive and instructive. One interested in questions of the law of infancy should consult it. See *Zouch.* Bullock v. Sprowles (1899), 93 Tex. 188: cases (minor need not tender consideration received by him before disaffirmance); 1 Dev. Deeds, 96. *See* Cummings, 8 Tex. 88; Womack, 8 Tex. 417 (must restore if he can, or if he spent it for necessaries).

Adult is bound, but not infant. Holt; Hunt.

Disaffirmance; rescission of contracts by infants. Craig; 111 Ala. 178, 56 Am. St. 38, n.; 2 Gr. Ev. 367.

Deeds of infants absolutely void. Trueblood, 8 Ind. 195, 65 Am. Dec. 756-758, n., Ewell, Lead. Cas., Mech. Ag., Huffc., Reinh., Tiff.; Bish. Conts. 930. *Contra:* Goodnow, 31 Minn. 468, 25 Am. Law Reg. (N. S.) 229, 234, n.: cases; 47 Am. Rep. 798-901.

May disaffirm his deed. Craig; Dolph, 156 Pa. 91, 36 Am. St. 25, n. *See* Craig; *Zouch;* 7 Mews' E. C. L. 1339, 1340 (this is a widely cited case); *Tucker v. Moreland, post,* 3 Wash. R. P. 250, 2 Kent, 234-237, Sto. Ag. 6, 1 Rand. Com. Paper, 267, 1 Sto. Eq. 240, 241; Williams, 11 M. & W. 256; *Whitney v. Dutch* (1817), 14 Mass. 457, 7 Am. Dec. 229; Ewell, Lead. Cas.; stated and followed in 94 Tex. 433 (note of infant voidable only).

Infant can only disaffirm his contract upon attaining his majority; he cannot during his minority. Lansing, 126 Mich. 663, 86 Am. St. 567.

May disaffirm without returning benefits and sue for any consideration paid. Gillis, 180 Mass. 140, 91 Am. St. 265, n. (strict rule).

Vasse v. Smith (1810), 6 Cranch (U. S.), 226, 1 Am. Lead. Cas. 293-330, Ewell, Lead. Cas.

Vasse stated: Plea of infancy; effect in actions ex delicto. V. employed S., an infant, as a factor or agent to sell seventy barrels of flour and remit as per instructions. By embezzlement or carelessness, or in some other way, the flour was lost. V. sued and S. pleaded infancy. Upon demurrer the plea was sustained, upon the ground that an infant can make no contract not beneficial to him. See Gilson.

Tetrow v. Wiseman (1872), 40 Ind. 448, Ewell, L. C., Pars. Conts., Bish., Whart. q. v.; Mech. Ag., 1 Rand. Com. Paper, 267, 2 Benj. Sales, 34-39 (contracts of

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infants voidable, not void). Huffc. Ag., Reinh. Ag.; 94 Tex. 435.

Tucker v. Moreland (1836), 10 Pet. 58, 1 Am. L. C. 280-329, ext. n., Ewell, 2 Benj. Sales, 25, 2 Gr. Ev. 369, Whart. Ev. 1272, Mech. Ag., Sto., Cool. Torts, 1 Rand. Com. Paper, Whart. Conts., q. v.; Pars., Chit., Bish., Ans.; Bigl. Fraud, Wash. R. P., Dev. Deeds.

Of the legal capacity of infants and their liability ex contractu and ex delicto. Tucker (validity of a deed), stating and citing Zouch, Gilson, Dixon (liability for torts), Vasse, Craig and Fetrow.

Important rules stated: The effect of the disaffirmance of the contracts of infants may be considered in reference to: 1. Contracts executory on both sides; 2. Contracts executed on one side only—first on the side of the infant, and second on the adult; 3? Contracts executed in whole or in part on both sides.

Keane v. Boycott (1795), 2 H. Bl. 511, 3 R. R. 494, Ewell, L. C.; stated, 2 Kent, 236, 1 Mews' E. L. C. 494, 2 Page, 855, Smith, 320, Whart. Conts. 48; *Holmes v. Blogg* (1818), 8 Taunt. 508 (4 E. C. L. R. 10), 2 Moore, 552, 7 Mews, 1333, 19 R. R. 445, Ewell, L. C. 111; stated, 2 Kent, 237; Craig; Englebert, 40 Neb. 195, 26 L. R. A. 177-192, ext. n. (necessity of returning consideration).

May disaffirm a contract for services and sue upon a quantum meruit. Tennessee Manufg., 91 Tenn. 154, 15 L. R. A. 211.

Leading rules further stated:

1. *Where the contract is wholly executory on both sides,* a disaffirmance by the infant simply cancels the obligation of the contract and leaves the parties where they were originally, both parties being free from all obligation or liability upon the contract. There is no doubt but that the infant may exercise his privilege of avoidance in all such cases.

   Tyler on Inf. and Cov. 75; 1 Pars. Conts. 321; Reeve, Domestic Relations, 243.

2. *First, where the contract has been executed (in whole or in part) on the side of the infant,* but is not executed on the part of the adult, and the infant disaffirms the contract, having received no consideration or benefit thereunder, he may sue for and recover the consideration moving from him by any appropriate action, as though no special contract had been made; in such cases the adult is of course discharged from any liability on the contract.

Medbury v. Watrous (1845), 7 Hill (N. Y.), 110 Ewell, L. C. 102, n., 44 Mo. 125.

Second. Where the contract has been executed in whole or in part on the part of the adult, but remains executory on the part of the infant, it is quite clear that it may be disaffirmed by the infant as in other cases. *See* Craighead, 21 Mo. 409.

But on principle it would seem

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clear that in such case (at least when he has reached his majority) he must return to the adult the consideration, if remaining *in specie* in his possession or control, and capable of return; but where articles other than necessaries have been supplied to the infant and are consumed or parted with, or money lent is expended, the consideration in such case being incapable of return, the adult is remediless. Dube, 150 Mass. 448, 15 Am. St. 228, n.

3. *In case of the disaffirmance of contracts executed in whole or in part on both sides, there is more difficulty.* The policy of the law seems to be to require the infant upon such disaffirmance to place the adult in *statu quo* so far as possible consistent with the preservation of his privilege, which is designed as a shield and not as a sword; but the protection of the infant is the main object, and the other seems to be secondary in importance, and must yield when its exercise is inconsistent with the former. *In præsentia majoris,* etc.; *Lex non cogit ad impossibilia.*

   Accordingly, when the infant elects to disaffirm his voidable contract he must disaffirm *in toto* (he cannot ratify in part and disaffirm in part), as well that portion which is to his advantage as that which is onerous to him. He cannot blow hot and cold at the same time; he cannot reprobate and approbate at the same instant. *See* ELECTION; RATIFICATION; CONFIRMATION; *Allegans.* It seems well settled, also, that if he rescinds his contract and seeks to reclaim the consideration moving from him, he must restore the consideration received by him, if in his possession or control. On tendering back such consideration he may recover.

Price v. Furman (1855), 27 Vt. 268, Ewell, L. C.; 65 Am. Dec. 194; Ewell, L. C.; Whart. Conts. 47-48a; Tucker; Vasse, 1 Am. L. C. 280-330, ext. n.; Craig, 18 Am. St. 569, notes.

Contracts of infants. Ans. Conts. 103-113, 1 Chit. 193-223, 2 *id.* 1291; Bish., 842-946; 2 Page, 849-893; 1 Add., 153-163; Whart., Leake, Pollock; 2 Gr. Ev. 662-668; Warwick v. Bruce (1813-1815), 2 M. & S. 205-210, 6 Taunt. 118-120 (1 E. C. L. R. 232), 14 R. R. 634, 6 Rul. Cas. 43-71, n., 2 Benj. Sales, 25-32; 2 Beach, Conts. 1344-1377; Bullock, 93 Tex. 188, 77 Am. St. 849 (disaffirmance of contract). *Craig; Zouch; Trueblood* (deeds of infants void); notes, *Craig v. Van Bebber.*

Judgments against infants; validity of. Sloane, 145 N. Y. 524, 45 Am. St. 630.

Judgment against infant without guardian

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void. Cowling, 69 Ark. 350, 86 Am. St. 200.

Arbitration of cause affecting. Millsaps, 137 N. C. 535, 70 L. R. A. 170.

Seduction of infant daughter is actionable. Terry v. Hutchinson, *sub,* SEDUCTION. And of adult daughter if she resides with her parents. *See* SEDUCTION; Borden v. Fitch.

Parents are bound to support their infants by implication. Expressio eorum, etc. Porter v. Powell (1890), 79 Iowa, 151, 18 Am. St. 353, n., 30 Cent. L. J. 286, 7 L. R. A. 176, ext. n., 1 Pars. Conts. 328; Cool. Const. Lim. 414; Miller v. Wallace (1886), 76 Ga. 479, 2 Am. St. 48, 15 Cent. L. J. 23; Pretzinger v. *id.* (1887), 45 Ohio, 452, 4 Am. St. 542.

Emancipation. Vance, 77 Ark. 35, 113 Am. St. 111-122. *Parent may emancipate minor and give him his earnings and surrender the right to sue for the same.* Ream, 27 Mo. 516, 72 Am. Dec. 283-286, n.; Wilson, 62 Ga. 16, 35 Am. Rep. 115, ext. n.; Cloud, 11 Humph. 104, 53 Am. Dec. 778; Cool. Const. Lim. 414 (6th ed.); Trapnell, 37 W. Va. 242, 38 Am. St. 30, n.; Halliday, 29 W. Va. 424, 6 Am. St. 653 (until emancipated he may recover earnings after child's marriage and until he is of age).

Abandonment of child. Swift, 138 Fed. 867, 1 L. R. A. (N. S.) 1161, n.

Parent must support them after divorce and custody taken from him. Hall, 87 Me. 122, 47 Am. St. 311-317, n.; *Re* Lally (1892), 85 Iowa, 49, 16 L. R. A. 681, n.; Sheers, 75 Wis. 44, 5 L. R. A. 781, n.; Bauman, 18 Ark. 320, 68 Am. Dec. 171-182, n.; Cowls, 3 Gilm. (Ill.) 435, 44 Am. Dec. 708-715, n. (father's right to custody of child). *And after emancipation.* Cool. Const. Lim. 414. *See* Foss, 168 Mass. 66, 60 Am. St. 366, n., also Zilley, 98 Wis. 428, 40 L. R. A. 579, n.; P. v. Turner: 252 (limitations of legislative power to interfere with parents' rights).

Custody of, descends to mother, upon father's death (Eyre v. Shaftsbury); and he cannot will or contract otherwise. Neider v. Reuff, 29 W. Va. 751, 6 Am. St. 676. Father of a bastard child is under no legal obligation to support it, in the absence of a statute. Simmons, 21 Ala. 501, 56 Am. Dec. 257-266, ext. n.; Porter; 2 Kent, 208-220. Custody of child; parent's right to. Lovell, 9 Wash. 419, 43 Am. St. 839, n.; Enders, 164 Pa. 266, 44 Am. St. 598, n., 27 L. R. A. 56 (parent may contract away). Custody of a legitimate child belongs to the father; of an illegitimate child, to the mother. R. v. De Manneville (1804), 5 East, 221-224, 1 Smith, 358, 7 R. R. 693, 13 Rul. Cas. 24-56: cases. Contracts affecting the parental authority—the custody of children; when valid. Gr. Pub. Pol. 493-495, 2 Add. Torts, 1233-1270; Anderson, 54 S. C. 388, 44 L. R. A. 277, n.: cases.

Parent and child; father is bound to support infant. Porter. Not bound to support bastards. Simmons v. Bull, *supra;* R. v. Smith; R. v. Falkingham; R. v. Morby; 1 Chit. Conts. 215. Nor child living with divorced mother. Foss, 168 Mass. 66, 37 L. R. A. 589.

Illegitimate children. 2 Gr. Ev. 150-153 (bastardy). Illegitimacy, evidence to prove; competency of husband and wife. Rabeke, 115 Mich. 328, 69 Am. St. 567-574, n.

Bastards. Inheritance by, through or from illegitimate persons. Croan, 94 Ky. 213,

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14 Ky. Law Rep. 915, 23 L. R. A. 753, n. Deed. Birtwhistle, 7 Cl. & Fin. 895: stated, Bro. Max. 517 (one must be a legitimate heir where lands are situate); Stevenson, 5 Wheat. 207, 227, 262; Bro. Max. 519, n. See *Actio personalis,* etc.; BASTARDY. 3 Encyc. Pl. & Pr. 267-319; Robinson v. R. R.

Adult child remaining at home cannct recover for services rendered parent, in absence of express contract. They are presumed to continue in relation of an infant. Perkins v. Westcott, *supra.* Continuity is presumed. Carotti v. S.; Disbrow, 54 N. J. Law, 343, 33 Am. St. 678, n. (services among relatives).

Parent's duty to support child as affected by child's interest in trust estate or other property. Nat'l Bk., 100 Va. 101, 57 L. R. A. 728-744, ext. n. Agency of infant to purchase necessaries. Huffc. Ag. 56; Reinh. Ag. 47; Peters.

Father only can sue for enticing of infant. Soper, — Ky. —, 1 L. R. A. (N. S.) 362, n. *Contra:* Kelly, 49 N. H. 176, 6 Am. Rep. 499: cases; Mortimore, 6 M. & W. 482; 2 Kent, 190, n.; 106 Am. St. 365, n.

Habeas corpus in controversies touching the custody. 7 Crim. Law Mag. 38; Brooke, 112 Ind. 183, 2 Am. St. 177-187, n.; *Ubi jus,* etc.

Adoption of children. Van Matre, 148 Ill. 536, 39 Am. St. 196-231, ext. n., 23 L. R. A. 665; Enders, *supra;* Nugent, 4 Wyo. 173, 20 L. R. A. 199, n.; Clarkson, 143 Mo. 47, 65 Am. St. 635, n. *Legal status of adopted child.* Warren, 84 Me. 483, 17 L. R. A. 435, n., 30 Am. St. 370; 1 Cyc. 914-937.

Custody of children; discretion of court. Marshall, 32 Fla. 499, 37 Am. St. 118, n.; *Eyre v. Shaftsbury;* Ramsey, *supra.* Neville, 134 Ala. 317, 92 Am. St. 35: cases (equity controls). Marriage of infant; emancipates him, how far. C. v. Graham (1892), 157 Mass. 73, 16 L. R. A. 578, n., 34 Am. St. 255. *State guardianship of children.* Whalen, 61 Conn. 263, 15 L. R. A. 593, n. *Enlistment of infants in the army; parent may reclaim or infant may withdraw upon reaching his majority. Re* Chapman (1889), 37 Fed. Rep. 327, 2 L. R. A. 332; Tarble's Case. But if over 18, he can enlist. Oliver, 1 Alaska, 1.

Guardian and ward. The father in his lifetime, and the mother after the father's death, is the guardian during minority. Eyre v. Shaftsbury (1722), 2 P. Wms. 103, 24 Eng. Repr. 652; Gilb. Eq. Rep. 172, 2 Eq. Cas. Ab. 710, 2 Lead. Eq. Cas. 1416-1530, ext. n.; Bisph. Eq. 540-544, 2 Sto., Pom., 2 Kent, 245. See *Porter v. Powell;* 2 Kent, 220-231; Benton, 92 Iowa, 202, 54 Am. St. 546, n.; Woerner on Guardianship; 2 Cyc. 1-276.

Necessity of a bond by a guardian to make his acts valid. Hatch, 68 Fed. Rep. 43, 33 L. R. A. 759, ext. n. Guardians. 9 Encyc. Pl. & Pr. 889-997. Common law power of guardians. Schmidt, 196 Ill. 108, 89 Am. St. 250-316, ext. n. Curator of estate must manage property—strict rule. Duncan v. Crook, 49 Mo. 116.

Infant's legacy; interest for maintenance; presumed intention. Beckford, 1 Vesey, Sr. 308-312, 13 Rul. Cas. 1-23: cases; 27 Eng. Repr. 1049. Equitable control of estates; interests, custody and welfare of. 13 Rul. Cas. 1-56: cases. Equity jurisdiction over. 37 L. R. A. 787.

Parent's right to support from child. Duffy, 149 Calif. 125, 117 Am. St. 125.

Necessaries for infants are such things as it

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is reasonable that they should have, and for these only are they liable in contract. Peters; 1 Chit. Conts. 195, 196, 2 Gr. Ev. 365-366, 2 Beach, 1366; Kilgore, 83 Me. 305, 12 L. R. A. 859, n.; Askey, 74 Tex. 294, 5 L. R. A. 176, n. Necessaries; what are. 2 Gr. Ev. 365-366, 2 Benj. Sales, 26; Peters. *See* HUSBAND AND WIFE: cases (same rationale); Ryder v. Wombwell.

Necessaries; infant can only contract for. A silver goblet and a pair of studs are not necessaries. Ryder; 1 Add. Conts. 156-160, 1 Benj. Sales, 27; 18 Am. St. 643-659, stating Peters; Ryder.

Service of process upon infants, how made. Galpin: 63. Right to sue and be sued; how made a party. *See* INFANTS; Sto. Pl.; also PROCHEIN AMI; NEXT FRIEND.

Marriage settlement; contracts of. Tabb v. Archer (1809), 3 H. & M. (Va.) 399, 442; Milner v. Harewood (1811), 18 Vesey, 259, n.; 34 Eng. Reprint, 259; Healy, 5 Grat. (Va.) 414.

Leading cases on contracts of infants: Zouch is an old and widely cited case on the capacity of infants to contract; it is stated in the notes to *Craig*, where also are cited *Peters, Vasse* and *Tucker*. Those notes are the ablest *resume* upon the contracts of infants. 18 Am. St. 569-724.

The right of infants to contract for necessaries is discussed in the cases of Peters and Ryder. To this point these great cases are cited.

Infant may sue without guardian, if adverse party does not object. Blumauer, 24 Wash. 596, 85 Am. St. 966.

Judgment against infant without guardian is void. Cowling, 69 Ark. 350.

Service of process on, is an Expressio unius proposition of strictness. Galpin: 63.

Insurance on life of an infant. O'Rourke, 23 R. I. 457, 57 L. R. A. 496, n.

Parent may recover for injury to child only to the extent its services due the parent are impaired. Hurst, 114 Ga. 585, 88 Am. St. 43, n. But child may recover for injuries tortiously done it, whether the tortious act affects the parent or not. Hurst.

Mother's right to sue for tort to child. McGarr, 24 R. I. 447, 60 L. R. A. 122, n. See *Actio personalis*, etc.

Immoderate chastisement inflicted by third person by consent of father is no cause of action. McKelvey, 111 Tenn. 388, 64 L. R. A. 991. Infant has no remedy against parent for corporal wrongs. Roller. See *Patria potestatis;* 2 Bouv. Dic. (general *resume*).

INFERENCE: Facts must be charged without inference, argument, construction or analysis. Green: 90; Cruikshank.

From a judgment, that it has a record to support it. Omnia præsumuntur vite.

INFERIOR TRIBUNALS: Jurisdictional facts must appear of record. Crepps: 113; Piper: 114. Records essential to protect. Crepps; Bouv. Dic.; 4 Mews' E. C. L. 1064-1015; Harvey: 123. § 27, Hughes' Proc.

IN FICTIONE JURIS SEMPER AEQUItas existit: A legal fiction is always consistent with equity. Bro. Max. 127-130, 8th ed.; Jackson v. Ramsey; Cooper v. Chitty; *Les fictions.* McManus; CONCLUSIONS OF LAW; TWYNE'S CASE; GENERAL EXPRESSIONS; §§ 306, 332, Hughes' Proc.

INFORMATION: Hurtado; Bouv.; And. Dic.

INGALLS v. BILLS: L.C. 353.

IN GENERALIBUS VERSATUR ERror: Error dwells in general expressions. *See* CONCLUSIONS OF LAW; GENERAL EXPRESSIONS; TWYNE'S CASE; *Dolus.*

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INJUNCTIONS: High; Brown on Jurisdiction; 7 Mews' E. C. L. 1526-1637.

Trespass. High, Inj. 750, 697-738; Bonaparte: 278; *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. 883, n.; 3 Pom. Eq. 1346-1358; *Carney v. Hadley* (1893), 32 Fla. 344, 37 Am. St. 101, 22 L. R. A. 233, 2 Beach, Inj. 1125-1166; *Cole Co. v. Virginia Co.;* Deegan v. Neville (1900), 127 Ala. 471, 85 Am. St. 137, n. (continued trespass may be enjoined). *Crescent Mining Co.*, 17 Utah, 444, 70 Am. St. 810; High, Inj. 730-738. Benefits and detriments will be considered. *Crescent, supra;* 138 Fed. 279, 1 L. R. A. (N. S.) 332-341 (to protect property in dispute).

Retention of case to assess damages where injunction was unavailing. Hazen, 70 Vt. 543, 67 Am. St. 680, n.; 2 Sto. Eq. 794, 6th ed.; 1 Pom. Eq. 236-240.

Election frauds; injunctions to restrain. P. v. Tool, 35 Colo. 225, 117 Am. St. 198-215. *Lex non exacte.*

Against crime. Hamilton: 280; *Paulk v. Mayor* (1898), 104 Ga. 24, 69 Am. St. 128, n.; S. v. Zachritz, 166 Mo. 307, 89 Am. St. 711, n.; S. *ex rel.* Kenamore v. Wood (1900), 155 Mo. 425, 48 L. R. A. 596: cases.

Injunctions against suits may be obtained. Bomeisler, 154 N. Y. 229, 39 L. R. A. 240.

Municipalities may protect streets by injunction. Drew, 150 Ind. 662, 42 L. R. A. 814-825, ext. n.

Pleadings in; degrees of certainty. L.C. 279.

Mining interests; injunctions to protect, favored, because of the municipality of suits and the difficulty of making proof of damage. High, Injunc. 730, 138 Fed. 279.

Against judgments. Hauswirth v. Sullivan: 264; Needham v. Thayer; *Audi alteram partem.* A tax. Tilton; TAXATION. Against enforcement of ordinance. 48 L. R. A., *supra:* cases.

Notice, if possible, must be given of applications for injunction. Weaver v. Toney.

Mandatory injunctions; jurisdiction to grant. Murdock's Case (1829), 2 Bland. Ch. (Md.) 461, 20 Am. Dec. 381-402, ext. n.; *Moundsville v. Ohio River R. R.*, 37 W. Va. 92, 20 L. R. A. 161-171, ext. n.; *Blakemore v. Glamorganshire Canal Co.* (1832), 1 Myl. & K. 154, 39 Eng. Repr. 639; Brown, Jurisdic.; *Cole, etc. Co.; Pile v. Pedrick* (1895), 167 Pa. 296, 46 Am. St. 677; *Great North of England Ry. v. Clarence Ry.* (1844), Colt. (Eng.) 507; Stated 10 Am. & Eng. Encyc. Law, 791 (order to pull down walls—obstructions to another R. R. crossing the line); High, Injunc. 2; 3 Pom. Eq. 1359; 1 Beach, 93-107; 10 Am. & Eng. Encyc. Law, 789-794, n.; Harrington, 169 Mass. 492, 61 Am. St. 298, n.; Blair: 170; Allen v. Stowell, 145 Calif. 666, 68 L. R. A. 223 (to tear down a dam).

Denials in answer to dissolve; requisites of. Poor: 37.

Motion to dissolve in vacation; issues. Hardy v. Summers; Blair: 170.

Bond essential for. Ex parte Miller (1900), 129 Ala. 130, 30 So. 611, 89 Am. St. 49, n.

Liability on bonds. Sub, Trapnall; Hyatt, 20 Ind. Ap. 148, 67 Am. St. 248, n.; Jesse French, 134 Ala. 3022, 92 Am. St. 31: cases.

Issues in. Hardy; Blair: 170.

Against suits in other states. Mostyn: 274; McKyring: 33.

Injunctions.—

Laches; effect of. *Fish,* 70 Conn. 720, 66 Am. St. 147, n. LACHES; *Vigilantibus.*

Breach of contract; injunctions against. Philadelphia Ball Club (1902), 202 Pa. 210, 90 Am. St. 627-652, ext. n.; Standard (1898), 157 N. Y. 60, 68 Am. St. 749, n.; Chain Co., 117 Wis. 107 (cites Lumley v. Gye—Lumley v. Wagner). *See* LANDLORD AND TENANT; SPECIFIC PERFORMANCE.

Contracts; to prevent breach of. Stovall, 117 Ky. 577, 92 Am. St. 373, n. (contract among merchants to close at a certain hour).

Generally: High, Bouv. Dic. 1038-1044; 22 Cyc. 1062 (to protect personal rights). *See* PRIVACY; Dority (to restrain sales of personalty); 49 Fla. 293, 111 Am. St. 95, ext. n. Are favored. § 40, Gr. & Rud.

IN JURE NON REMOTA CAUSA SED proxima spectatur: In law the immediate (proximate) and not the remote cause of any event is regarded. Bac. Max. Reg. 1; Bro. Max. 216-230; 1 Suth. Dam. 15-52.

Max. No. 38, §§ 343-348; *cited,* p. 41, §§ 154, 343, Hughes' Proc.

Cited, §§ 8, 67, 293, 296, Gr. & Rud.

Leading cases: Glison v. Delaware Canal Co. (completest *resume* of cases); Scott v. Shepherd (Squib Case): cases; Vanderburg v. Truax (chasing negro boy with pickax); Guille v. Swan (balloonist causing damage by assembling a crowd to aid him); Thornilly v. Prentice; Vicars v. Wilcocks; Fletcher v. Rylands (tort, remoteness; privity in); Fent (fire); Hadley v. Baxendale; Langridge v. Levy; Thomas v. Winchester (drug case); Rodgers v. R. R.; Winterbottom; Victorian R. R. v. Coultas (tort); R. v. Pym (crime; cause of death).

One is presumed to intend the natural, direct and probable consequences of his act. Squib Case; C. v. York (crime). *See* EVERY; Hadley; Thomas; Shoemaker.

Malicious torts; proximate cause. Isham, 70 Vt. 588, 45 L. R. A. 87-92, n. *See* MALICIOUS ACTS; *Sic utere;* DAMAGES.

Causation. Labatt, Master and Servant, 802*a*, 815; Squib Case; Thomas.

Causa proxima non remota spectatur. Ionides Case, quoted, 3 Suth. Dam. 803. Delay of carrier of freight destroyed by act of God. Rodgers.

A third person making performance of a contract impossible is not liable over. Byrd v. English, 117 Ga. 191, 64 L. R. A. 94.

Res gestæ matter involves considerations of what is proximate and what is too remote. *Expressio eorum,* etc.

In jure, etc., is constitutional in character if it is viewed as indispensable for affording the remedies which society guarantees. Galbraith v. Illinois Steel Company. From those guarantees one often appears as his brother's keeper. In this aspect *In jure* appears as broad and as deep as *Ubi jus ibi remedium* or as *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* Such principles are the fountains of the law, and the cases which show the application of those principles are mere rivulets. The fountains of these should be familiar to every student; he should know these fountains and how to find and reason from them. *Melius est petere fontes quam sectari rivulos.* The truth of this maxim is well illustrated in the ramifications of *In jure* throughout all parts of the law. From it great discussions issue and flow.

In Jure.—

Construction is involved in all cases where this is the question: *Are the consequences the natural, direct and probable result of his act?* Accordingly the immense discussions of remote and proximate cause are not separable from a fundamental rule of evidence nor from construction, nor from the necessity of affording remedies for wrongs. From this view we have the truth of the maxim *Cujus est instituere ejus est abrogare* illustrated.

From many viewpoints *In jure* may be viewed as a principle of the unwritten constitution. It does not appear less when it is involved as a necessary principle in affording a remedy. Any abuse of the principle against one charged with liability would be condemnatory and confiscatory in the highest degree. Its true limitations must be known and familiar. Its limitations should not be extended beyond the rule that *a fault binds its own author.* *See* Pasley: 375; Lickbarrow: 394. The last case applies a profound principle of equity which is often expressed in this language: *Where one of two equally innocent persons must suffer from the fraud of a third he who first trusted must first suffer.* Upon this principle one is often remotely held for his conduct or declarations, as is illustrated in *Thomas v. Winchester* (drug—belladonna case). Langridge; *Qui sentit.*

The rule requiring privity in contract has received much attention in cases like *Hendrick v. Lindsay:* 319, *Lawrence v. Fox* and *Winterbottom v. Wright.*

In jure, etc., does not wholly relate to contract nor to tort, damages, negligence, crime, equity, construction nor procedure. Those who contend that the branches of the law can be individualized find that such maxims as *In jure* belong to all branches, and like the sap in the plant they give life, force, reason and protection. It is such maxims that demonstrate that the law is an entirety, and certainly that we have a prescriptive constitution.

It is a leading rule of evidence when we state its principle this way: *One is presumed to intend the natural, direct and probable consequences of his act.* If one entices one to break a contract and thus cause damage he is liable therefor. Allen v. Flood. Or the wife to desert the husband. Lynch v. Knight.

In Jure.—

Suppose the legislature were to provide that no one should be liable for the natural, direct and probable consequences of his act, could such a statute be respected? The spirit of such an act would be opposed to the ends and purposes of government, which are to afford remedies and to redress wrongs. Such an act would be the legislative authorization of the infliction of irremediable wrongs; such an act would thus sanction wrongs. Under such an act many wrongs would be without remedy; *Ubi jus ibi remedium* would be a faded and lifeless maxim. Without more, it would be clear that there are principles expressed in maxims that rest securely above legislative interference as if they were expressed in constitutions. Church; Galbraith; *In præsentia majoris.*

IN PARI DELICTO POTIOR EST CONDITIO defendentis (et possidentis): Where both parties are equally in fault, the condition of the defendant is preferable. L.C. 358-363; Greenh. Pub. Pol., *q. v.*; 2 Kent, 466; 11 Mass. 376; Bro. Max. 719; 1 Story, Conts. (4th ed.) 591, 592, 1 Page, 506-543; 9 Cyc. 465-577; Sto. Eq. 296-298; 22 Cyc. 1099-1100; *In æquali jure melior;* Whitworth, 3 Am. St. 725-746, ext. n.; Wiggins, 92 Tex. 219, 71 Am. St. 837, n.; Bliss, Pl. 272, 273; Berka, 125 Cal. 119, 73 Am. St. 31.

Cited, §§ 3, 14, 18, 42*a*, 69, 88-111, 133-137, Hughes' Conts.

Cited, p. 16, §§ 4, 5, 5*a*, 122, 133, 147, 149, 151, 154-158, 180, 299, 326, 333, 345, Hughes' Proc.

Cited, §§ 1, 40, 46, 52, 77, 260, 280, 285, Gr. & Rud.

Defenses need not be pleaded. Cansler, 125 N. C. 578, 48 L. R. A. 441, n. (the defense, that a contract is invalid on grounds of public policy, cannot be waived by failure to plead it); 1 Page, 577. *See* SOVEREIGNTY; Benj. Sales, 503-559; 2 Beach, Conts, 1417; Camp, 96 Va. 521, 70 Am. St. 873, n.; Field: 84: cases.

No remedy is afforded illegality. See Holman v. Johnson: 363: cases; Greenh. Pub. Pol. (ablest *resume* of this class of defenses); Seabury: 281; Fivaz v. Nicholls (1846), 52 E. C. L. R., 69 R. R. 514; Oscanyan: 41; CORAM JUDICE; *In æquali jure melior;* 1 Bouv. Dic. 964 (immoral consideration). Seduced person cannot sue therefor. *See* BREACH; Hegarty.

In pari causa possessor potior haberi debet: When two parties have equal rights, the advantage is always in favor of the possessor. Dig. 59, 17, 128. Possession is presumed rightful. *In æquali.*

In pari delicto melior est conditio possidentis: When the parties are equally in the wrong, the condition of the possessor is preferable. Bro. Max. 325; *In æquali; Favorabiliores;* Bro. Max. 601, 715; *Verba fortius. See* EQUITY MAXIMS.

Mala prohibita. Statute regulating hours of work; an employe cannot recover for more services than permitted. Short, 20 Utah, 20, 45 L. R. A. 603: cases.

One cannot contract against fraud or gross negligence. *Modus,* etc.; *Pacta privatorum,* etc.; Bro. Max. 696, 714; § 18, Hughes' Conts.; Bouv. Dic.; Smith, Conts. 208, 303, Whart. Conts. 335, 488; Reinh. Ag. 66-79.

Appellate procedure. An appellate court will *sua sponte* notice, without objections, exceptions or assignments of errors. Campbell: 2; Fuqua, 90 Tex. 298, 35 L. R. A. 241; Greenh. Pub. Pol. 116-120; Bro. Max. 715.

In Pari.—

The idea is morality; this view is presented elsewhere. *See* MORALITY; CHRISTIANITY; *Ex turpi causa; Ex turpi contractu;* Collins v. Blantern; Merryweather; *Pacta,* etc.; 180 U. S. 476.

Assured person dying from criminal operation, or if executed for crime, cannot recover. Burt, 187 U. S. 362 *(Volenti non fit injuria).*

Contract for newspaper to support a candidate is unlawful. Livingston, 74 Vt. 356, 52 Atl. 965, 93 Am. St. 901-912, ext. n., 59 L. R. A. 336; Fitch, 66 Cal. 339.

A party to a contract in restraint of trade cannot defeat it because the contract is illegal as a trust. 116 Fed. 304, 58 L. R. A. 915.

Allowing injunction in favor of party *in pari delicto* against enforcing or otherwise proceeding with illegal contract. Basket, 115 N. C. 448, 48 L. R. A. 842-851, ext. n.; Gorringe, 23 Utah, 120, 90 Am. St. 692, n.

To furnish evidence. Wood, 30 Colo. 287, 97 Am. St. 138-151.

Agreement to dispose of official salary void. McGregor, 130 Mich. 505, 97 Am. St. 492, n.; Dickinson.

In no age could one stipulate for iniquity. 2 Kent, 466. *Ex turpi contractu.*

When a contract to do something which is prohibited by law has been executed, the party in possession of the profits arising out of the unlawful acts will not be allowed to set up the illegality of the subject-matter of the contract as a defense to an action of account thereon. Gilliam, 43 Miss. 641; Smith, Conts. 651, n.; 1 Whart. 35-37; Brooks: 370: cases.

Jurisdiction does not attach to forbidden things. Fabula non judicium. Courts were not created to enforce honor among thieves. Woodson, 81 Miss. 171, 107 Am. St. 275-290: cases, 70 L. R. A. 645. Nor to sit as bandits dividing booty. *Crimen omnia. See* JURISDICTION.

IN PARI MATERIA: All provisions and enactments must be construed together. Bouv. Dic.; §§ 136, 234, 292, Gr. & Rud.; Burks: 217*a*; Slate, 101 Me. 37, 115 Am. St. 294; Suth. Stat. Construct. 260, 283-288, 219, 309; 35 Wis. 557; Zann, 71 Ind. 136, 36 Am. Rep. 193; Smith, Construct. 636-659; *Cavendum est a fragmentis* (beware of fragments); *De minimis non curat lex* (the law does not concern itself about trifles); *Ex tota materia emergat resolutio* (the construction or explanation should arise out of the whole subject-matter); Bro. Max. 575; *Incivilia est, nisi tota lege prospecta,* etc.

Cited, §§ 16, 29, 133, 270, 273, 287, 289, 292, Hughes' Proc.; Russ v. C., 210 Pa. 544, 105 Am. St. 825.

One section is known by another. Suth. Stat. 262, 283; *Noscitur a sociis; Ut res magis valeat quam pereat.*

Laws must be harmonized. Concordare, etc.; Dennis, 127 Cal. 453, 78 Am. St. 79.

Not only the words but the conduct of the party may be considered. *Contemporanea expositio,* etc.; *Index animi sermo. See* PRACTICAL CONSTRUCTION. Contracts may arise from acts. Moller.

Each clause of a contract must be considered. McKay, 21 Utah, 239, 50 L. R. A. 371, n. *See* EVERY WORD, etc.

All compacts are construed alike. Carter v. Gear (1905), 199 U. S. 348: cases.

Each provision of the 14th Amendment, Constitution of U. S., must stand or fall by itself. Cox v. Texas.

IN PRAESENTIA MAJORIS CESSAT potentia minoris: In the presence of the major the power of the minor ceases. Bro. Max. 111, 112; Max. No. 18, §§ 210-214, also cited pp. 16, 33, 42; §§ 1-50, 122, 155, 167, 178*a*, 188, 210, 214, 216, 262, 298, Hughes' Proc.

Cited, §§ 1, 4, 46, 47, 49-52, 63, 72, 78, 82, 100, 106, 108, 123, 152, 163, 164, 167*a*, 191, 198, 202, 211, 240, 263, 272, Gr. & Rud.

This maxim leads the way of the broad jurist and of the constructive statesman. It is often applied in international law. This law and its parts relating to the ambassador, the consul and treaties, leagues, compacts and truces is from the Roman civil law, which brings with it the principal maxim.

What concerns the public peace and welfare of nations is a matter of grave and permanent concern. For these ends lesser laws yield. Statutes yield to constitutional law and to treatises, also those matters upon which depend the scheme of government, its influence and perpetuity. Trist: 214; *Church v. U. S.*

For the highest and most important matters of government and the public welfare lesser laws yield; *e. g.*, it is essential for government that there be obedience to law. For this laws must be fixed and of uniform operation. For this the principle of *stare decisis* is maintained and respected. There must be law and obedience to it. *Obedientia est legis essentia.* Hughes' Proc., §§ 10-11. For these ends there must be a supreme court. This is created and maintained by constitutional command. And it is a principal thing so created and existing for the highest and most important purposes. It is well to observe here that whatever is necessary for the operation of this requirement of government is attracted by implication. *Expressio eorum quæ tacite insunt nihil operatur* (what is implied is the same as if expressed). M'Culloch: 147; Bates: 225; S. v. Townley: 225*a*; Kern v. Huidekoher: cases.

Concession to courts of the power to provide a room, appoint a clerk or sheriff, provide a record and punish contempts are essential matters that annex themselves as incidents or implications, or inherent powers. *S. v. Townley.* These powers are from statutes; they issue from necessity, which is a rudiment of law.

The establishment and operation of the judicial department afford many striking illustrations of the application of the principal maxim. It is instructive to consider it in connection with *Cujus est instituere ejus est abrogare* (he who can institute can also abrogate). Hughes' Proc., pp. 1-43. This maxim well indicates the importance of construction, also that *stare decisis* depends thereon.

The judiciary is paramount in a constitutionalism. It is thought well to write and teach that the division of state power, which is the first great underlying principle in a government of limited and defined powers, depends upon three *equal* and *coordinate* powers of state, namely, the executive, legislative and judicial. But it must ever be borne in mind that the latter speaks last and tells the former what they thought and what they intended. Therefore, to the judiciary it is proper to apply *In præsentia majoris cessat potentia minoris*, also the other maxim, *Cujus est instituere ejus est abrogare, supra.* It often seems that this is the most perfect statement of the rule. It is only a theory that the three departments of state are coordinate and equal. This was the doctrine of the strict constructionist who always stands on *Ita lex scripta est* (so the law is written). This was a state's right doctrine, which constantly opposed constructive statesmanship by jurists. They denied that the law was judiciary-made. They have always warred on the doctrine in *Marbury:* 142, also in *M'Culloch:* 147. They have opposed that construction that interprets fundamental law and its influence as a silent factor which operates as an unwritten constitution.

Have American states a prescriptive constitution is a question of leading importance. This should be early introduced to the student for his consideration and determination. Constitutional law is the highest; it is supreme; it dominates all lesser laws, therefore it may be well first to consider it. Instructors often recommend that the student begin by memorizing the federal constitution. Beyond this he must learn what it means; for this he must study such cases as *M'Culloch:* 147, *South Carolina v. U. S.*, *Marbury:* 142, *Martin v. Hunter:* 246, *Cohens:* 244, *Tarble's Case:* 247, and *Ableman v. Booth.*

Contention for an unwritten constitution is, that it is made of maxims, precedents and customs; that constructive statesmanship adds to a constitution by construction. That it imports the maxims *Salus populi suprema lex* (the welfare of the public is the highest law), *Necessitas*

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inducit privilegium quoad jura privata (necessity excuses one acting under its influence), *Summa ratio est quæ pro religione facit* (where the laws of God and of man come in conflict the former shall be preferred), also *Ignorantia legis neminem excusat* (ignorance of the law is no excuse) and other fundamental principles. Principles springing from these maxims are constantly interpreted into the constitution.

Construction imports morals in the constitution. Christianity has been declared a part of the law of the land in America as it has always been considered in England. *Church of the Holy Trinity v. U. S.; Trist:* 214. Decisions show that whatever is conducive to the welfare, stability and perpetuity of government is interpreted into both constitutions and statutes. Indeed, the express letter in these yield to construction.

M'Culloch: 147 (constitutional); Oakley: 222 (constitutional); *P. v. Turner:* 252 (constitutional); *Indianapolis R. R.:* 223 (statute); Bates: 225 (statute); *Church v. U. S.* (statute. Christianity is a part of the law of the land). *Posito,* etc.

The conserving principles of procedure involve many phases of an unwritten constitution. These spring from discussions of the record or constitutional rule and the *coram judice* rule which are elsewhere defined and explained. *See* Planing Mill Co. v. Chicago: 2*d*; S. v. Townley. To illustrate it may be here observed that *Verba fortius accipiuntur contra proferentem* (every presumption is against the pleader) is the mystic rule. Dovaston: 217. Upon its right application depends a government of limited and defined powers. For if a court is not bound by its record then it may act from caprice and whim; it could do wrong if it chose.

If a statement presented no ground for complaint or matter of defence then it is presumed that the pleader is without merits. To presume otherwise would be judicially to declare a case or a defence. If so, what might not a court declare? Then what evidence would be irrelevant? The maxim *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged) and its cognates would cease to be protective. There is nothing expressed in constitutions of greater consequence than the underlying basic principles of procedure. Upon that maxim depends whether or not a government

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in its proceedings is accusatory or is inquisitorial or barbarous in form. That maxim enters into the nature and structure of government. To support this proposition a consideration of the last two maxims cited is invited. From that consideration let it be determined whether or not there exists a prescriptive constitution. 64 Cent. L. J. 129-134, 169-174.

The federal constitution declares the highest law and as follows:

"This constitution and laws made in pursuance thereof and treaties made or which shall be made by the authority of the United States shall be the supreme law of the land and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The influence of the supreme law of the land and of an unwritten constitution is an important factor to be considered throughout construction. These are high laws and to them all other laws yield. *In præsentia majoris cessat potentia minoris.* S. v. Sheppard; Virginia Coupon Cases: 285*a*; Kelly: 285.

It is well to observe that the federal courts construe these laws agreeably to the rules of liberal or logical construction. There is no difference between the broad constructionist and him who insists there is an unwritten constitution. This may be tested by the decisions of England and America.

Contract, tort and crime are construed alike in both England and America. And so are the powers of courts. The conserving principles of procedure are viewed alike in both countries. The grounds and rudiments of law are the same in both countries. Construction from these produce like results. *Ubi eadem ratio ibi idem jus* (like reason makes like law).

From necessity great fragments and patches of the civil law of Rome have been borrowed by England and America. Accordingly, international law, treaties, admiralty, equity, commercial paper, the law of descents and distributions and rational procedure have been imported.

These great strands have brought with them the great canons or maxims of construction. These are made applicable to all subjects, *e. g.*, while the nomenclature of the law of real estate is feudal or middle age in origin still its acquisition, possession, enjoyment and devolution are in ac-

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cord with the maxims and polity of the civil law. *Regula pro lege, si deficit lex* (where the law is deficient the maxim rules). *S. v. Sheppard.*

Phases of the principal maxim are frequently presented from construction. There it should be recognized and in all cases wherever a fundamental principle discloses itself it should be recognized. As the fixed leading star lights up and leads on from age to age so do the maxims—the condensed good sense of nations. In fixed, uniform and protecting jurisprudence they are the beacon lights. They are old and well worn but they have worn best. 64 Cent. L. J. 129-134, 169-174.

Maxims are the acorns from which spring giant oaks, figuratively speaking. To illustrate: Christianity has been mentioned. It is not separable from morality, therefore they may be referred to as synonyms. The maxim *Summa ratio est quæ pro religione facit* includes a part of the sermon on the mount and especially "Ye cannot serve God and mammon." This is an acorn or the grain of mustard in the parable. In contract it is a veritable oak viewing it from *Keech v. Sandford*, the root of which is a paraphrase, thus, "no one can act where his integrity and his interest are in conflict." In America case titles locate this principle. One of these is *Michoud v. Girod*, another is *Davoue v. Fanning.*

In procedure the idea has quite a different dress; here it is *Nemo debet esse judex in propria sua causa* (no man shall be judge of his own cause). In England the case title that stands for this is *Dimes.*

Further, no can can serve his own process. *Singletary.* No one can be both plaintiff and defendant. Accordingly appears a great rule of procedure, of equity, trust and trustee, contract, agency, in the law of sales and of corporations. It pervades every branch, limb, twig and stem of the law.

A further illustration is afforded in Allegans contraria non est audiendus (he who alleges contradictory things shall not be heard). This is the basis of all the estoppels. It is a close relative of the command not to bear false witness. It presents itself in the impeachment of witnesses, where the rule is, *Falsus in uno falsus in omnibus* (false in one thing false in all).

The estoppels are high laws. They are four, namely, estoppel by record, by deed, forensic estoppel (Baily: 44) and equitable or *estoppel in pais.* Estoppels are applied for morals and consistency. For this in their operation they often exclude the truth. They involve *Salus populi suprema lex*—public policy—also. They contribute to many rules of evidence. Herein they are the acorn or the grain of mustard. Therefrom springs the greatest rule of evidence, which is the *record or constitutional rule already referred to.* To know this rightly one must know its limitations wherefrom he will perceive those of oral and parol evidence. In evidence there are both major and minor rules, for some rules of evidence dominate; they override others, *e. g.*, conclusive presumptions, judicial notice. Estoppel of record is the highest of the estoppels. These interlace and interweave all of the law or they may be likened to the river referred to under equity. Indeed, judgments depend on them, and judgments are a classification of contracts; the other classes are deeds and simple contracts. Without more it will appear that estoppel law is a very high, a dominating and an all-pervading law, and that it rests on maxims of morality. These are greatly respected, as they should be, and they dominate agreeably to *In præsentia majoris cessat potentia minoris.*

Closely related to estoppel of record is collateral attack, the doctrine of which also nestles among the highest of laws. It involves the important tests to determine when there has been a hearing. *Audi alteram partem; Windsor:* 1. Where it is applied, there title to property fails for apparently slight and trivial grounds. Williamson: 65.

Construction ever attends a right comprehension of the law. At the base of construction are the maxims *In præsentia majoris*, etc., and *Cujus est instituere, etc.* already introduced. These must be comprehended; also what is constitutional or organic law, and whether or not this is written or unwritten, or both. At the threshold the student should consider and settle these questions for himself and as speedily as possible. Until he does he will be im-

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peded by fluctuating endless discussions. Without star, compass, sextant or anchor he will drift in an uncharted ocean. Such discussions menace and impede juridical knowledge. Therefore the student must pause, consider and determine. If he perceives that the maxims of the Roman are also the laws of England and also of America then this broadened vision will greatly limit what must be grasped. Then he will see that American law is only another name for the law from of old and from on high. He will see that, like the river already referred to, its origin is where clouds and glaciers meet on sunlit crests whence rivers start in all directions. These are better impressed at their origin than at their endings where they are lost in the silt, the mud, the sand and the marshes. *Melius est petere fontes quam sectari rivulos.* Then he will see that "the Roman still holds dominion over this world by the silent empire of his law"; also, that when his maxims are enfleshed and taught then this proposition will be accepted: *Regula pro lege, si deficit lex.* Also, that when presented as dry bone they are not comprehended. Also, that to the mother of dead empires this world still looks for its religion, language and law, the greatest gifts to man. The acorns of these are imbedded in the cornerstones of her greatest gifts to posterity. Also, that the law from on high dominates and molds all lesser laws; these lesser ever yield to the greater. *In præsentia majoris cessat potentia minoris.*

States cannot affect federal procedure. Blair, 109 Ga. 204, 77 Am. St. 532; Blake v. McClung (instructive case); Virginia Coupon Cases: 285*a*.

IN REPUBLICA MAXIME CONSERvanda sunt jura belli: In the state, the laws of war are to be greatly observed. 2d Inst. 58; Tyler v. Pomeroy; *Necessitas*, etc.

INSANE: May sue by a next friend. Isle, 199 Ill. 39, 64 L. R. A. 513-534, ext. n.

Imprisonment of insane when acquitted of crime. Brown, 39 Wash. 160, 1 L. R. A. (N. S.) 540-551, ext. n.

INSANITY: Defense of. § 294, Gr. & Rud.; McClain, C. L. 154-179; 2 Gr. Ev. 369-374; Bouv., And. Dic.; 9 Mews' E. C. L. 647-661 (in relation to civil rights and duties).

In criminal cases. U. S. v. Drew; C. v. Gerarde; McNaghten's Case; C. v. Rogers; R. v. Oxford; *stated*, And. Dic. 551; 4 Mews' E. C. L. 111.

Insanity as affecting judgments. Spurlock, 19 Ky. L. Rep. 1321, 39 L. R. A. 775-784, ext. n.

Insanity.—

Measure of proof in insanity cases; what sufficient. Kelch v. S. (1896), 55 Ohio, 146, 37 L. R. A. 737-748, ext. n. Opinion evidence to prove. *See* EXPERTS: cases, 39 L. R. A., n.

Drunkenness causing insanity. See U. S. v. Drew; 12 Cyc. 170-176.

Burden of proof. S. v. Marler; And. Dic. 551; L. C. 185. Sanity presumed. R. v. Oxford. *See* CONTINUITY.

Lucid intervals. 2 Bouv. Dic. 285, 286. Mania. 2 Bouv. 306. Moral insanity. 2 Bouv. 438.

Contracts of insane persons. 2 Beach, Conts. 1378-1414; Molton: 413; Beverley's Case: 416; 2 Page, 894-902.

Torts; no defense for. Krom.

Cannot slander. Irvine v. Gibson, 117 Ky. 306, 111 Am. St. 251.

Generally: 22 Cyc. 1104-1248; 12 Cyc. 164-176.

INSOLVENCY: 22 Cyc. 1249-1362.

INSPECTION OF DOCUMENTS: Right to. Caswell, 18 R. I. 835, 49 Am. St. 814, 27 L. R. A. 82-85, n.; 2 Dill. Corp. 303; 2 Bouv. (Record); And. Dic. 553; Ferry, 12 Vroom (N. J.), 332, 32 Am. Rep. 219, n.; Webber, 43 Mich. 534, 39 Am. Rep. 213, 29 Am. Law Reg. 60; 1 Gr. Ev. 471.

When a court will order. 1 Gr. Ev. 477, 478, 1 Wh. 742-756, 1 Beach, Eq. 863, And. Dic. 554. *See* VIEW OF PREMISES.

Inspection of the person. See *Res ipsa loquitur;* Austin.

INSTALMENT CONTRACTS: Rules relating to. Ans. Conts. 292, n. Effect of breach. Cutter: 308; Britton; Norrington.

INSTRUCTIONS: *See* CHARGE (1 Bouv. Dic.); MISDIRECTION (2 Bouv. 420). *Ad quæstionem facti*, etc.

INSURANCE: Leading cases: *Carter v. Boehm* (the assured must take care of the underwriter of marine insurance); *Behn v. Burness* (warranty of representations); Godsell v. Baldero; Dalby v. Ins. Co. (insurable interest).

Fire. 3 Suth. Dam. 820-830, 13 Rul. Cas. 467-547 (making of the contract). When complete. Insurance Co., 104 Ga. 67, 69 Am. St. 134-153, ext. n. Illegality. 13 Rul. Cas. 547-568. Inception and duration. 13 Rul. Cas. 568-716; White: 303: cases.

Fidelity. 19 Cyc. 516-526.

Life and accident. 3 Suth. Dam. 831-840; 25 Cyc. 687-957.

Is not a contract of indemnity only; important rationale. Dalby; Ans. Conts. 179.

What is an accident. Horsfall, 32 Wash. 132, 98 Am. St. 346.

Voluntary exposure to unnecessary danger. Rustin, 58 Neb. 792, 46 L. R. A. 253, n. *See* TRAVELERS, *post.*

Marine. 3 Suth. Dam. 801-818, 3 Kent, 254-352; 14 Rul. Cas. 1-540; 26 Cyc. 538-742.

Policy, how construed. Carter; Blackett; Harper: 218. Insurance agents. 13 Rul. Cas. 401-466.

Representations, when material, are warranty of facts stated. Carter. Suicide of assured releases underwriters. Billings. Proximate and remote cause in insurance cases. *See* Travellers' Case, *post.*

Assignment of life insurance policies. Chamberlain, 61 Neb. 730, 87 Am. St. 478-519, ext. n.; 25 Cyc. 764-780.

Lien on policy issued to beneficiaries for moneys loaned to insolvent to pay premiums. Lehmann, 124 Ala. 213, 51

Insurance.—
L. R. A. 112, n. To one paying premiums. Life Ins. Co. v. Elison, 72 Kans. 199, 3 L. R. A. (N. S.) 934-954, ext. n.
Conditions in policy; waiver of. Assurance Co., 183 U. S. 308-365; 62 Ohio, 529, 49 L. R. A. 760; Richard, 114 La. 794, 69 L. R. A. 278-282, 107 Am. St. 92-149, ext. n. *Cf.* German Ins. Co., 68 Neb. 1, 60 L. R. A. 918: cases. *See* ORAL EVIDENCE.
Forfeiture of life insurance by false representations with respect to previous applications for insurance. Security Co., 45 C. C. A. 648, 106 Fed. 808, 55 L. R. A. 122. Undeveloped and unknown disease at time of application is no ground for forfeiture. Fidelity Co., 107 Fed. 402, 53 L. R. A. 193-210, n.
Policies construed like other contracts. Travellers' Co. *See* Carter.
Stipulation for immediate notice of injury. Travellers' Co.
Life insurance as assets of bankrupt or insolvent. Morris, 110 Ga. 606, 50 L. R. A. 33-46, ext. n.
Live stock insurance. 25 Cyc. 1516-1522.
Lloyd's insurance. 25 Cyc. 1523-1529.
Generally: 2 Gr. Ev. 375-410; 3 Suth. Dam. 810-840; Bouv. Dic. 1065-1085; 2 *id.* 694 (policy); 3 Kent, 254-376; 22 Cyc. 1380-1450; 1 Cyc. 237-304 (accident).

INSURANCE CO. v. FOLSOM: L.C. 157.

INTELLIGENCE: Elsewhere the scheme of government is stated to include education and the dissemination of intelligence. The establishment of the means of these is reflected from the public schools, the post-office and the public library; also from judicial operations. A comprehension of the high policies of procedure discloses much that relates to and presumes intelligence. Explications and citations of that basic maxim *Ignorantia legis neminem excusat* are designed to impress the manner in which official action educates and morally advances. For its exercise it is a conclusive presumption that all know the law: The officer is charged with knowing the validity of his process (Savacool: 164); how to arrest, and to return his process, and the consequence of failure.
One buying property must take notice of the rights of an occupant (Williamson); and of facts and circumstances that would disclose the true title. He must take notice of unregistered deeds. LeNeve: 396; *Vigilantibus,* etc.; 116 Wis. 400, 442; *Caveat emptor.*
From the conserving principles of procedure may be seen the intelligence exacted of the citizen; and also the morality exacted in order to secure official aid. Hegarty; R. v. Conde; Trist: 214: cases.
Intelligence and morality influence many rules of procedure, and more than is often observed.
Every presumption is against a pleader, is a rule of intelligence, morality and protection. Dovaston: 217; *De non apparentibus,* etc.; *Actore non,* etc. One who claims a wrong must intelligently allege and prove it; One who asserts the existence of a law must show it. *Semper præsumuntur pro negante.*
The claimant of a right founded upon official action must comprehend procedure, and its dependence upon the mandatory record, and that what ought to be of record must be proved by record. COLLATERAL ATTACK; *Caveat emptor;* CONSTRUCTIVE NOTICE; GOVERNMENT.
It is no hardship to respect and enforce the established rules of procedure. *See* HARDSHIP. § 21, Hughes' Proc.

INTENT: Suth. Stat. 363-641; *Verba intentione;* Bouv.; And. Dic.; McClain, C. L. 111-128. § 304, Gr. & Rud.
One is presumed to intend the natural, direct and probable consequences of his act. Scott v. Shepherd: cases; C. v. York; S. v. Smith. McClain, C. L. 84, 86, 105; 12 Cyc. 188.
No element in torts. § 63, Hughes' Conts. *See* Rideout. *Is in crimes.* See *Actus non facit reum,* etc.
Necessary for an agreement or contract. *See* CONTRACT; ASSENT; *Non hæc in fœdera veni;* Ans. Conts.
When important in cases of contract for unlawful purposes. Ans. Conts. 191, 192; Holman: 363: cases.
Of the parties, to be gathered from construction of whole of contract. Ans. Conts. 252; *In pari materia.*
When ascertained, all technicalities of expression give way to it. Ans. Conts. 144, 306; Wilkins' Deeds.
Act and intent must concur to constitute crime. Actus. Criminal negligence supplies malice. R. v. Longbottom. Statutory crimes; intent no element unless made so. P. v. Roby.
Tacking and collateral intent. Spies v. P.; C. v. Moore; Conrad v. S., 75 Ohio St. 52, 6 L. R. A. (N. S.) 1154. Shooting at one and killing another. S. v. Mulhall, 199 Mo. 202, 7 L. R. A. (N. S.) 603, n.
How proved. C. v. York; 1 Wigm. Ev. 117. *See* MALICE. Acts indicate the intention. C. v. York; S. v. Smith. Omission of duty shows intent. R. v. Hughes; C. v. Presby. System; when admissible to show. See *Res inter alios,* etc.; P. v. Molineux.
Is presumed from act. Ellis v. U. S.; C. v. York; S. v. Smith; P. v. Roby; *Acta exteriora,* etc.
Insanity as a defense. M'Naghten: 195; C. v. Rogers; Loeffner v. S.
Motive as an actionable element. *See* MALICIOUS ACTS.
Premeditation, what is. C. v. Tucker, 189 Mass. 457, 7 L. R. A. (N. S.) 1056-1076, n.

INTER ALIA: Among other things.

INTEREST: Selleck v. French (1814), 1 Conn. 32, 6 Am. Dec. 185, 1 Am. Lead. Cas. 610, ext. n. (computation and allowance of); Bouv.; Suth. Dam. 300-389 (able *resume*); Sedgk. Ld. Cas. Dam.; 8 Mews' E. C. L. 175, 176.
Higher rate after default may be contracted for as liquidated damages. Close, 40 Or. 592, 91 Am. St. 500-589, ext. n.

INTEREST REIPUBLICAE UT SIT finis litium: It concerns the public that there be an end to litigation. Bro. Max. 331, 343, 893; 59 Fed. Rep. 868. *See* RES ADJUDICATA; *Nihil in lege intolerabilius,* etc.
Max. No. 8, § 126, Hughes' Proc.; also *cited,* §§ 73, 120, 122, 126, 146, 328, *id.;* §§ 53, 91, 171, 173, 258, Gr. & Rud.
A cause once disposed of on its merits is ended. See *Res adjudicata.* Its application depends upon a record, so that it may be determined what was considered. *De non apparentibus,* etc. The application of this maxim depends on certainty and what is mentioned in relation thereto.
Leading cases: Perez v. Fernandez: 2*e* (U.

Interest.—
S.) (what could or might have been heard is presumed to have been. Splitting causes of action is not permissible. § 53, Gr. & Rud.); Hahl v. Sugo (N. Y.); Bendernagle (N. Y.): Emerson: King (Splitting causes of action not permissible); Marriott v. Hampton (recovery at law ends litigation); Pakas v. Hollingshead (1906), 184 N. Y. 211-221: Suit on one clause of an installment contract concludes all others. *Citing,* Bendernagle v. Cocks; Cromwell: 26; Roehm v. Horst (U. S.); Black, Judg. 734, 751.

Courts will not notice trifles. De minimis; Sto. Pl. 500-502.

This maxim is the idea upon which *Nemo debet bis vexari*—former jeopardy —rests. It is basic in the law of *res adjudicata* and is a part of *Salus populi suprema lex,* which is an important ground and rudiment of law. Carefully consider with the above: 1 Gr. Ev. 63; 2 *id.* 7; 3 *id.* 10. *See* Marriott v. Hampton.

It demands that exceptions be promptly and aptly taken, that causes may be disposed of upon their merits (§ 53, Gr. & Rud.); and it demands the record proper for *res adjudicata* purposes. It is interwoven with the conserving principles of procedure. This maxim was instructively applied in Collier (1907), — Mo. — 106 S. W. 971-980.

Injunctions will protect the rule of this maxim. *See* BILLS OF PEACE.

From this maxim many rules of procedure are reflected. Its influence and ramifications are great. Draper; Ruckman.

A cause will not be reversed if justice has been done. See *De minimis.*

INTERNATIONAL LAW: A part of the Civil Law. §§ 35, 77, Gr. & Rud.

Is part of the supreme law of the land. §§ 77, 78, *id.*

Construed by the Civil Law. §§ 77, 139, *id.*

Importance of. Kansas v. Colo., 206 U. S. 46-118.

INTERPLEADER: *See* Sto. Pl. 291, *et seq.;* Sto. Equity; 23 Cyc. 1-36. *Cf.* Sto. Pl.; Shaw v. Coster (1840), 8 Paige, Chan. 339, 35 Am. St. 690-712, n.; North Pac. Lumber Co., 28 Or. 246, 52 Am. St. 780, n.; Bouv.; And. Dic. 564; 8 Mews' E. C. L. 347-396. *Bill of.* Bouv. Dic. The right of interpleader. Connecticut Mut., 23 R. I. 1, 91 Am. St. 590-613, ext. n.; Kan. v. Colo., 206 U. S. 46. *See* INTERVENTION.

INTERPRETATION: 1 Bouv. Dic. 1005-1007; 2 Whart. Conts. 627. *See* CONSTRUCTION. *Interpretare et concordare leges legibus est optimus interpretandi modus; Concordare.* 8 Coke, 169. *Scire leges; Interpretatio chartarum benigne facienda est ut res magis valeat quam pereat.* See *Ut res magis;* Bro. Max. 543; *Benedicta.*

INTERSTATE COMMERCE: 2 Bouv. Dic. 1108-1114. *See* COMMERCE; Gibbons; P. v. Knight, 171 N. Y. 354, 98 Am. St. 610.

States can not interfere with. Adams Ex. v. Ky. (1907), 206 U. S. 135: cases.

INTERVENTION: Wood, 20 Colo. 253, 46 Am. St. 288, n.; Brown, 4 Martin (N. S.) 434, 16 Am. Dec. 176-184, n. *See* INTERPLEADER; Bouv. Dic. Citizens of same state may intervene in same court. Freeman: 287; Buck.

INTOXICATING LIQUORS: 23 Cyc. 43-344; McClain, Cr. Law, *q. v.*

IRELAND v. ELLIOTT (1855), 5 Ia. 478, 63 Am. Dec. 715-717, n. *Cited,* § 313, Gr. & Rud.

IRON CLIFFS CO. v. NEGAUNEE CO. (1905), 197 U. S. 463. *Cited,* § 125, Gr. & Rud.; *Audi.*

IRONS v. SMALLPIECE. *See* GIFTS.

IRRELEVANT: *See* SURPLUSAGE.

IRREPARABLE INJURY: Facts showing, must be pleaded. 1 Am. St. 378, n. *Must not rest in conjecture.* Schmaltz, 204 Pa. 1, 93 Am. St. 782.

What is, in meaning of law of injunctions. 1 Am. St. 374, 379, 85 *id.* 137; High, Injunc.

ISRAEL v. REYNOLDS: L.C. 83.

ISSUES: The necessity of issues for a trial is indicated from a consideration of the conserving principles of procedure. The parties, the court, its officers, and the whole public are interested. *See* IDENTIFICATION. The parties must present an issue to show from the mandatory record their right to a trial. Munday: 79: cases; Crain v. U. S. The court looks from the charter creating and investing it with jurisdiction and the matter presented by the pleadings, and determines from these how it should proceed to dispose of such matter, and such issues, according to established rules of procedure. §§ 237, 276, Gr. & Rud.

Courts are bound by their records. §§ 56-61, 272-279, Gr. & Rud. Munday; Sache.

Contestatio litis egit terminos contradictarios: An issue requires terms of contradiction; that is, there can be no issue without an affirmative on one side and a negative on the other. Jenk. Cent. Cas. 117. Munday: 79; Israel: 83.

Issues. Issue essential for a trial. It is abuse of power to order a trial without an issue. And, on principle, prohibition and mandamus should protect a litigant from such abuse and its consequent delay, uncertainty and expense. *See* Adams v. Gill; Kollock; Avon; Bassett.

The mandatory record must present the issue. It must appear to authorize the court to proceed. It is a question of authority, of power, and of jurisdiction, that is involved. Consequently, it is as important in the civil as in the criminal case. The rationale is the same. Crain; Davis v. S.; Munday: 79: cases; Israel: 83; Wisconsin Co. (code). And so the criminal cases all hold, but many *contra* civil cases can be cited. This indicates that the necessity for the mandatory record is not comprehended by all courts. §§ 1-12, Hughes' Proc.

Parties are charged with diligence and intelligence as to making and perfecting the mandatory record. Ignorantia legis, etc. That record is a basic requirement in a constitutionalism. Upon it depends the supreme law of the land. § 21, Hughes' Proc.; §§ 83-123, Gr. & Rud.

That record cannot be abolished or destroyed. Indianapolis: 223: cases. It is required by due process of law. Ferguson: 264.

Courts sua sponte take notice of allegations, admissions, denials and issues, and instruct the parties as to these. Gay: 138; Kollock; Cothran; *Ad quæstionem,* etc. *May direct that new matter be denied or demurred to.* Kollock.

Must be tendered with certainty, without argument, inference, or analysis. *See*

Issues.—
CERTAINTY; ALLEGATIONS; DENIALS; Dickson: 34: cases; JURISDICTION.
The best evidence is required; the right record must present. Crain; Iverslie: 46: cases. § 143, Hughes' Proc.
There shall be no departures from. Kewaunee: 29 (code).
In criminal cases the jury tries. S. v. Croteau: 271; Sparf; *Ad quæstionem.*
General issue. *See* GENERAL ISSUE. This is sometimes favored. Cuenin, 32 Colo. 51; Kollock.
Injunction cases. Blair: 170: Dinehart: 279.
False and sham issues confer no jurisdiction. Graver: 103; *Fabula.*
The record is construed to determine the real, certain and bona fide issue. Dickson: 34.
Construction is guided by the requirements of the conserving principles of procedure. *See* CERTAINTY; Crain.
Waiver of issues; after verdict or judgment, want of, cannot be questioned for the first time. Deatricks v. Ins. Co. (1907), — Va. —, 59 S. E. 489, 13 Va. Law Reg. 952, *citing* Kelsey v. Lamb, 21 Ill. 559; Southside R. Co., 20 Gratt. 344 (modern rule); Briggs, 99 Va. 273 (statute of jeofails does not apply to, but is waived just the same); Preston, 91 Va. 585; Norfolk R. R., 104 Va. 665 (equivocal); Keator v. Thompson, 144 U. S. 434 (reply waived). *See* Crain v. U. S.; MANDATORY RECORD; CONSERVING PRINCIPLES; §§ 83-123, Gr. & Rud.
Judicial notice cannot supply. 180 U. S. 133; *De non apparentibus;* RES ADJUDICATA; Kollock; Crain.
Defenses not pleaded are waived. Wisconsin Co. (code); Cromwell: 26; Field: 84; J'Anson: 91.
Equitable issues are tried first. *See* EQUITABLE ISSUES; *Res adjudicata;* Sto. Pl. 700, 743; Beach, Eq. Pl. 309. *Abatement issues; how tried.* *See* ABATEMENT.
Must be certain in order to found perjury. *See* PERJURY; *Coram judice;* DUE ADMINISTRATION OF JUSTICE; JURISDICTION; CERTAINTY; GOVERNMENT; CONSTITUTIONALISM; *Cujus est instituere,* etc.; *Ad quæstionem,* etc.; *Quod ab initio,* etc.; Shutte: 291. §§ 39, 41, 89-103, Hughes' Proc. (general *resume*); 23 Cyc. 358-370.
ITA LEX SCRIPTA EST: See *Lex non exacte,* etc.; *Supervacuum,* etc.
ITEMS OF ACCOUNT: See BILL OF PARTICULARS.
IVERSLIE v. SPAULDING: L.C. 46.
JACK v. KANSAS (1905), 199 U. S. 372. S. P. Barron. *Cited,* § 268, Gr. & Rud.
JACKSON v. ASHTON (1834), 33 U. S. 93-94. *Cited,* § 97, Gr. & Rud.
Captions of pleadings are no part thereof. Allegation of citizenship therein is insufficient to give jurisdiction to federal courts. *Matter of Gorman* (1906), 15 Am. B. R. 587.
Allegations in statement must be consistent with those made in the caption. *Leonard v. Pierce* (1905), 182 N. Y. 431, 1 L. R. A. (N. S.) 161, n.; Pain: 107.
There are also technical rules relating to the *ad damnum, e. g.,* if it is amended then this at that stage gives the right to removal from the state to the federal courts, if the amendment is for damages exceeding $2,000.
JACKSON v. CLEVELAND (1866), 15 Mich. 94, 90 Am. Dec. 266-277, ext. n., Dev. Deeds, Wash. R. P., Tiede. R. P.; 2 Whart. Conts. 682, 683; Whart. Ev.

Jackson.—
923-928, 1046, 1047; §§ 41, 80, Hughes' Conts. *Cited,* §§ 173, 174, Gr. & Rud.
Deeds. A grantee by acquiescence and acts may accept a deed. Welborn: 388.
Fraud, accident or mistake must be shown before an absolute deed may be varied. Jackson; Rann: 312. *See* ORAL EVIDENCE. *Or a total failure of consideration.* Feeney, 79 Cal. 525, 4 L. R. A. 826; Wood, 15 R. I. 518; Huff. & W. Conts. 430 (consideration may be varied).
Deeds; recitals of amount of consideration in, not conclusive. Jackson; 3 Smith, L. C. 2115, 9th ed.; R. v. Inhabitants (1789), 3 T. R. (D. & E.) 474-476, 14 Rul. Cas. 744, 1 R. R. (real consideration may be shown); Bigl. Estop. 476; Fowlkers v. Lea, 84 Miss. 507, 68 L. R. A. 925-934. S. P. Jackson.
A consideration is presumed in deeds and commercial paper; it is *prima facie* presumed to give effect until fraud, accident or mistake is shown. Jackson; Collins; Velten, 23 Or. 282, 20 L. R. A. 101-114 (defenses to attack consideration); Koch, 150 Ill. 212; 1 Beach, Conts. 387. Deeds and notes import a consideration. Rann. Legislatures alone can change this rule. McMillan, 33 Minn. 257; Huff. & Wood. Conts. 54.
Seals; technical effect of. Ellis: 389; Loach; Gibson v. Warden (when surplusage); 1 Beach, Conts. 386. Estoppel by deed. Christmas (a grantee is bound by accepting a deed; *Id.*); Cobb, 151 Ill. 540, 42 Am. St. 263, n.
Recitals in a sheriff's deed are prima facie evidence of the facts. *Farrior,* 100 N. C. 369, 6 Am. St. 597. *See* S. v. Thomas; TAX DEEDS; DEEDS; Cooch.
JACKSON v. PHILLIPS (1867), 14 Allen (Mass.), 571, 19 L. R. A. 428, Perry, Trusts, 2 Kent, 237, Wash. R. P., Pom. Eq.; Beach, Eq.; Bisph. Eq.
Trusts; charitable trusts; *cy pres* doctrine. Jackson, 1 Beach, Eq. 204; Tilden v. Green (1891), 130 N. Y. 29, 27 Am. St. 437, 14 L. R. A. 33 (doctrine rejected); McHugh, 97 Wis. 166, 65 Am. St. 106, n., Adams, Eq. 226-240, 4 Kent, 305, 1 Beach, Eq. 148-168, 202-209; Festorazzi, 104 Ala. 327, 25 L. R. A. 360-363, n. (request for masses for repose of soul is void); Crerar, 145 Ill. 625, 21 L. R. A. 454, n.; Kelly, 18 R. I. 62, 19 L. R. A. 413-432; Almy, 17 R. I. 265, 12 L. R. A. 414, n. *See* Harding v. Glynn.
Public charities; statutes of uses and trusts. 43 Eliz., ch. 4; Stratton, 149 Mass. 505, 5 L. R. A. 33, 42, ext. n. *What are.* Hoeffer, 171 Ill. 462, 63 Am. St. 241-269, ext. n.
Certainty and unity required. Fifield, 94 Va. 557, 64 Am. St. 745-772, ext. n.
JACKSON v. RAMSAY (1824), 3 Cow. 75, 15 Am. Dec. 242-255, ext. n.
Relation, doctrine of. Cooper v. Chitty.
JAMES v. BOWMAN: L.C. 233.
JANSEN v. HYDE (1895), 8 Colo. App. 38, 40. A mandatory record is essential to support a judgment from collateral attack. *See* Hume. § 23, Hughes' Proc.
Pleadings essential to support a judgment. Legere, 17 Colo. App. 472, citing Jansen Case.
Judgments without foundations—records are void. Jansen v. Hyde. "Except judgments by confession or consent." These exceptions place this case with Hume. Therefore it, too, may be cited for the abrogation of pleadings, the clerk, the division of state power, and the record, and for the nullification of the code. *See* Hume.

Jansen.—

An issue is essential for a trial. 6 Colo. App. 554; 7 Colo. App. 315, also cited in § 275, Hughes' Proc.

J'ANSON v. STUART: L.C. 91.

JEFTS v. YORK: *See* Sturdivant: 410.

JENKINS v. LONG (1862), 19 Ind. 28, 81 Am. Dec. 374-376, n. S. P. in Pasley. §§ 147, 150, Hughes' Proc.

Deceit; misrepresentation. Representation to be fraudulent must be of a fact, and not an expression of opinion; must be false to a material extent; must be made under such circumstances that a party has a right to rely on it, and must be relied upon.

Chandelor: 374; *Caveat emptor* cases. Inducing a marriage contract by deception avoids it. Van Houten; Crocker, 164 Ill. 282, 56 Am. St. 196, n., sale of mining stock, and discusses Tuck v. Downing, and Southern Development Co., 125 U. S. 247.

Fraud must be specially pleaded under the code, although at common law it could be given in evidence under the general issue. *See* J'Anson; *Ex dolo malo,* etc.

Misrepresentation generally. Ans. Conts. 146-153, 175-199, Bisph. Eq. 197-218, 2 Pom. Eq. 876-909. Adams Eq. 166-193; Patrick; Crocker, *supra.* Prospectus of projected company. Bisph. Eq. 208; Central R. R.; L. R. 2 H. L. App. 99, 2 Pom. Eq. 881; Cook on Corporations; Keech; *Caveat emptor: cases;* Ewart, Estoppel.

JEOPAIL: (Fr., *J'ai faille:* I have failed): The statutes of jeofails and amendments have caused great disturbances and multiplied varieties of expression by aroused and eloquent legislators who have often started out with great power and animation to exterminate technicalities. Only after years of experiment have they learned that there are some statutes classed as constitutional which nevertheless are inoperative and void. Hughes' Proc. 204; Indianapolis: 223. Statutes opposed to reason, necessity and morals are void *ab initio.* The conserving principles of procedure rest upon rules and requirements that are above the capricious command of legislatures or the indefensible decisions of courts. *See* STATUTE OF; amendments to; Rushton: 5; Bristow: 135; Dovaston: 217; J'Anson: 91; PRESCRIPTIVE CONSTITUTION. Codes often provide for liberal construction and that technicalities be disregarded. Dovaston: 217; also § 32, Judiciary Act, 1789; Laber v. Cooper, 7 Wall. 565, 66 Cent. Law Jour. 347; 441-442.

Does not apply to indictments. Bouv. Dic. *See* §§ 53, 83-123, Gr. & Rud.

Construction from mandatory requirements of a limited and defined government is one thing, while construction from the rights of the parties named upon the record is quite another. Technicalities upon which depend the frame and nature of a government must be respected, *e. g.,* what relates to the division of state power and how jurisdiction is conferred and exercised. §§ 56-67, Gr. & Rud. See *In præsentia;* JURISDICTION; CODES.

JEOPARDY: Essentials of. 6 Am. Crim. Rep. 345. *See* FORMER JEOPARDY; And. Dic.

JEWETT v. DRINGER (1878), 30 N. J. Eq. 291, n., 8 Cent. L. J. 90-93, n.; Suth. Dam., Pars. Conts., Cool., Moak, Underh. Torts, 583, 588; 101 Am. St. 904-905, ext. n. *Cited,* § 307, Hughes' Proc.

Jewett stated: A junk-dealer, by collusion with the employees of a railroad, secured a large quantity of old iron at underweight and price, all of which he mixed with a heap of iron belonging to him, so it could not be distinguished. *Held,* he must forfeit the whole mass.

Jewett v. Dringer; Isle Royal, 37 Mich. 332, 26 Am. Rep. 520, n.; 1 Gray, Cas. Prop. 92; *cited,* Cool. Torts, Bish. Conts. 701; Peters, 133 U. S. 670; Keener, Quasi-Conts. 385, 386: cases; Robinson, 39 N. H. 557, 75 Am. Dec. 233-237; Woodenware Co., 106 U. S. 432; Burd. Cas. Torts, 154: cases, 22 Am. Law Reg. (N. S.) 677, 3 Suth. Dam. (value of property removed from government land, recoverable when demanded). *See* Bright; Bull.

Doctrine of confusion and accession; title by. Pulcifer, 32 Me. 404, 54 Am. Dec. 582-597, ext. n., Bish. Torts, 989; Carpenter, 42 Neb. 728, 32 L. R. A. 422-435, ext. n., stating Silsbury. If wheat is worked into bread, olives into oil, or grapes into wine, by a wrong-doer, he loses the whole of it, even his labor. Silsbury, 3 Comst. 379, 4 Denio, 332, 6 Hill, 425, 53 Am. Dec. 307, 41 Am. Dec. 753, 1 Gray, Cas. Prop. 72, Suth. Dam., Pars. Conts.

Trespasser gives no title to innocent purchaser. Powers, 87 Md. 34, 47 Am. St. 304, n.; R. R., 37 O. St. 283, Wat. Tres., Sedgk. Dam., Cool. Torts, Bish. Torts; Bentley; Hilberry.

Innocent purchaser is only liable for actual value of what he received. U. S. v. R. R. (1904), 192 U. S. 524.

A trespasser cannot plead the benefit of his trespass. Bull; *Nullus commodum,* etc.

JOHNSON v. BAILEY (1891), 17 Colo. 69. The mandatory record restrains a *dictum.* S. P., Cohens; Wadsworth, *sub,* Cohens.

JOHNSON v. BAKER (1865), 38 Ill. 98. *Cited,* § 125, Gr. & Rud.

JOHNSON v. JONES (1867), 44 Ill. 142, 92 Am. Dec. 159, And. Am. Law. *Executive officers bound by the laws.* Mostyn. And are liable for their transgression.

Martial law. Milligan's Case.

JOHNSON v. P. (1859), 22 Ill. 311. A plea of not guilty must be entered of record. S. P., Hoskins, Crain.

JOINDER OF CAUSES: Brugger: 162; 23 Cyc. 376-451. See *Ex contractu* and *Ex delicto;* 2 Bouv. 9; Bliss, Pl. 112-134.

Ex contractu, ex delicto and equity cases cannot be joined. Kewaunee: 29.

Separate statement of each cause essential. Bell v. Brown.

Whether injuries both to person and property constitute but one or more than one cause of action. King. Codes provide what causes may be joined. Emerson v. Nash.

Consequences of omitting a cause. Hahl v. Sugo.

Joinder of counts. Sub S. v. Croteau; Brugger v. State Investment Co.

Of parties. Sub Brugger; Rice v. Shute; Bouv. Dic.

Of crimes. Sub Brugger Case, 735; 2 Bouv. 9.

Joinder of necessary parties jurisdictional. Recovery at law ends litigation. St. Louis

Joinder.—
R. R., 52 Fed. 371, 3 C. C. A. 129, 10 U. S. App. 339.
JOINT AND SEVERAL LIABILITIES: 2 Page, Conts. 1131-1146.
JOINT CONTRACTS: Bouv. Dic.; 1 Beach, Conts. 668-689, Whart. 824-835. *See* Rice v. Shute.
Judgment against one is no bar to the other. Booth, 116 Ga. 8, 94 Am. St. 98, n. (negotiable instrument).
Much confusion has resulted from legislative interference with this class of contracts. This fact may be learned from the fluctuating decisions in New York and Illinois. It seems defensible to say that each case that arises is a law unto itself. Procedural questions greatly disturb this class of contracts. The question is whether or not, if one elects to sue one promisor at a time, afterward the promisee can sue two or more in the same action. The trouble seems to arise in construing the statutes; the courts are unable to construe them liberally and for the convenience of the plaintiff and to avoid a multiplicity of suits, uniformly holding that the *ex contractu* action is put on the same broad footing as is the *ex delicto*.
JOINT TENANCY: 23 Cyc. 482-496.
JOINT TRESPASSERS: Who are. Scott v. Shepherd. Kirkwood v. Miller. Each is liable for the acts of all. Warren, 44 Minn. 237, 20 Am. St. 578, n., 4 L. R. A. 48; Burk, 179 Pa. 539, 57 Am. St. 607, n.; Woodbridge v. Connor (1860), 49 Me. 353, 77 Am. Dec. 263; Elliot, 1 C. B. 18-41 (50 E. C. L. R.), 68 R. R. 652. Partners; liability of one for acts of others. Williams, 115 Ala. 277, 67 Am. St. 32-51, ext. n. Officers, agents and directors of corporations; same rule. Losee; Cameron, 22 Mont. 312, 44 L. R. A. 508, n. (directors); Greenberg, 90 Wis. 225, 48 Am. St. 911-992, ext. n., 28 L. R. A. 439 (officers).
Liability of servant or agent as a joint trespasser. Hodgson, 78 Minn. 172, 50 L. R. A. 644, ext. n.; Harriman v. Stowe. *Master and servant as joint trespassers.* Howe v. N. P. R. R. (1902), 30 Wash. 569, 60 L. R. A. 949, n.
Generally: 2 Bouv. Dic. 16. *See* NEGLIGENCE; ELECTION OF REMEDIES.
JONES v. JUST: L.C. 376.
JONES v. PETALUMA CITY (1868) 36 Cal. 231. Surplusage; Immaterial averments in a pleading need not be answered; and if answered, they are not made material, but continue surplusage. 1 Gr. Ev. 63.
Denials upon information and belief sufficient. Vassault, 32 Cal. 597; Roussin, 33 Cal. 208. *See* Humphreys: 38.
JONES v. RICE: *See* COMPOUNDING. *Cited,* §§ 154, 156, 158, Hughes' Proc.
JORDAN v. BROWN (1887), 71 Iowa, 421. *Jurisdiction depends on* (1) *the law,* (2) *pleadings.*
Captions must correctly entitle the court. It must be described.
Pleadings must be properly entitled. See CAPTIONS.
Assignment of error must present all parties. See ASSIGNMENT OF ERRORS.
JORDAN v. COREY (1850), 2 Ind. 385, 52 Am. Dec. 516-525, ext. n. *Cited,* Dev. Deeds.
Acknowledgments to deeds. § 146, Hughes' Conts.
JORDON v. GREENSBORO: L.C. 228.
JORDON v. NORTON: L.C. 324.
JUDGE: Cannot sit in his own cause. *Nemo debet esse judex;* Keech; Dimes: 176; Oakley: 222; 2 Bouv. Dic. 20-25; And. Dic.; 11 Mews' E. C. L. 1345-1350; 23 Cyc. 499-621. Cannot delegate his function. Van Slyke: 177. Cannot be a witness in a cause he is trying. Bouv. Dic.
Judex non potest esse testis in propria causa: A judge cannot be a witness in his own cause. 4th Inst. 279. Judge cannot be a witness.
Judex non potest injuriam sibi datam punire: A judge cannot punish a wrong done to himself. 12 Coke, 114. Dimes: 176; *Nemo debet esse judex.*
Judex non reddit plus quam quod petens ipse requirit: The judge does not give more than the plaintiff demands. 2d Inst. 286, 84. *See* ALLEGATIONS; PRAYER; White: 140; *Ad damnum.* A court is bound by its record. *See* DICTUM; JURISDICTION.
Judicial immunity. Lange: 159; 2 Bouv. Dic. 22. *Rex non potest peccare.*
JUDGE AND JURY: Province of each. *Ad quæstionem;* S. v. Croteau: 271; Blair: 170; Bonnell: 185; 4 Wigm. Ev. 2550-2559.
Waiver of jury by defendant. 3 Am. Crim. Rep. 241; Work: 242.
What constitutes a petit jury. Work: 242.
JUDGE-MADE LAW: *See* DEPARTURE; 2 Bouv. Dic. 23; Lange: 159.
JUDGE'S NOTES: Not competent evidence. Bouv. Dic.; 1 Gr. Ev. 166.
JUDGMENT RECORD: *See* MANDATORY RECORD. The record which founds the right to issue execution. Bouv. Dic.
JUDGMENTS: The word "judgment" includes its record, the authority upon which it was entered. Clem: 2*c*; Windsor: 1; Campbell v. Greer (Mo.): 2*a*. *See* CODES; DICTUM; USURPATION; Sto. Pl. 10; COLLATERAL ATTACK; MANDATORY RECORD.
A right knowledge of contract and of real estate law depends upon a right understanding of the judgment and its foundation record. This fact is discoverable from cases like *Windsor:* 1 and *Williamson:* 65. Deeds given at execution and judicial sales rest upon the validity, the regularity of judicial proceedings. These must be sufficient or the deed or contract falls. *Debile fundamentum fallit opus* (where the foundation fails all falls to the ground). Relating to these views are questions of what must *affirmatively* appear, when it must appear, how it must appear and what will be presumed to uphold the judgment, the estoppel or the title. Issuing from these considerations are discussions of incurable error, of nullities *(Quod ab initio)* on the one hand and of mere irregularities, exception matter, of condoned error *(Consensus; Omnia præsumuntur rite)* on the other.
Jurisdiction and all that it implies has also to be considered. It includes the cause of action (Fabula non judicium). As to this there is not only

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a diversity of view among the states, but there is hopeless confusion in the same set of reports in the same state, *e. g.*, in Illinois some of the cases hold that jurisdiction depends on, first, jurisdiction of the person, and second, the general law authorizing the entry of a judgment relating to a subject-matter without regard to the particular matter described by the pleadings and the foundation record. *Cf. Fish:* 12*c* with *Franklin Lodge.*

Another prolific source of confusion arises from the rule in *Crepps:* 113, which distinguishes between the requirements of inferior and statutory tribunals, and superior courts proceeding according to the course of the common law. In *Crepps*, the authority to enter the judgment must appear from the face of the judgment record or entry of the justice. In superior courts the authority may appear and be shown from the files or *aliunde.*

Proceedings from inferior and statutory tribunals must show on the face of the grand record the authority to proceed. What does not appear thereon is presumed not to exist. But for a superior court there are presumptions in its favor, except when used to prove an estoppel of record or a title to property founded thereon. Clem: 2*c*. For the latter purposes the judgment must be certain, but to make it certain the entire mandatory record is called for and attends. See §§ 124-126, Gr. & Rud.

An in personam judgment depends on actual service of process. Pennoyer: 58. Also a matter described that will lawfully support the judgment. *See* JURISDICTION; COLLATERAL ATTACK; *Audi alteram partem.* Also that a court sit at a right time. Davis v. Fish (Sunday judgments void). § 126, Gr. & Rud.

All contract works divide the subject of contracts into three classes, namely: Judgments, deeds and simple contracts. This view is surrounded with ceaseless and unending discussion; all doubt its correctness, still they adhere to it and act upon it. Bouv. Dic.: CONTRACTS. Whether a judgment is viewed from contract, or procedure, it is truly instructive. Procedure is that body of rules that direct the manner of establishing judgments and sequestrating orders in accordance with the due administration of justice. The validity of judgments depends upon compliance with those rules. If a judgment is established in violation of them, it is open to collateral attack. *See* COLLATERAL ATTACK. Judgments

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profoundly involve the conserving principles of procedure, and, of course, all that concerns them. From this view may be traced the ramifications of judgments throughout the *ex contractu, ex delicto* and procedure fields. *See* Preface and §§ 27, 27*a*, Hughes' Conts.; AWARDS; COMPROMISES; 1 Bouv. Dic. 25-36; And. Dic. 576; Ans. Conts. §§ 51-103, Hughes' Proc.

Judgments depend upon their foundation, the mandatory record. Sto. Pl. 10; Bliss, Pl. 136; 2 Suth. Dam. 465-467; Windsor: 1; Munday: 79; Sache.

Attachments to support; sufficiency. 76 Am. St. 800-805. *Probate proceedings; presumptions of regularity.* 81 Am. St. 535-562.

What is the foundation of. §§ 104, 108, 115, 119, 148, 149, 153, Gr. & Rud.; Clem: 2*c*. *See* MANDATORY RECORD; §§ 124-133, Gr. & Rud.

Different kinds of matter for a foundation of. See pp. 7, 15, 23, 25, 32; §§ 5, 31, 79, Hughes' Proc.

A judgment entered without authority is forever open to collateral attack. See COLLATERAL ATTACK; *Debile;* notes, Lampleigh: 301; Williamson: 65. And even the judgments of the supreme court. Horan: 85. *See* DICTUM.

The rule of pleadings, that lack of jurisdiction of subject-matter can never be waived, means what it says. Campbell: 2. That the general demurrer searches the whole record and attaches to the first fault, is forever true.

Fraud vitiates. Needham: 261. *Equitable jurisdiction over.* Ferguson: 264; Hauswirth: 51; Needham: 261; Furman: 262. Relief for fraud. Ferguson: 264; Bates, 144 Mo. 1, 66 Am. St. 407, n.; *Ex dolo malo,* etc.; Ans. Conts. 110. May be inquired into. Needham: 261; Wonderly: 102.

Judgments must be certain as to parties. 1 Freem. Judg. 50*a*. *See* PARTIES. As to amount. Tilton: 133; 1 Freem. Judg. 50*b*; *Carpenter v. Sherfy* (1874), 71 Ill. 427; 2 Suth. Dam. 467. Dead person; may be entered *nunc pro tunc.* Cumber: 311; *Actus curiæ,* etc.; Kager, 61 Kan. 342, 78 Am. St. 318.

Merger; its operation by way of. Ans. Conts. 316. Estoppel. Ans. Conts. 44, n., 316.

Continuing lien of judgment opened or set aside to permit a defense. Farmers', etc. Co., 46 Neb. 677, 41 L. R. A. 222, ext. n.; Filley.

Lien of, upon after-acquired property. Moore, 117 N. C. 86, 42 L. R. A. 209, n.

Constructive notice from, depends upon entry of record, and indexing as required by statute. Rockwood, 37 Minn. 533: cases.

It must be certain. Bankers' Loan, etc., 99 Va. 606, 36 Am. St. 914 (must be certain for constructive notice).

Must be entered of record. 2 Bouv. Dic. 37; Callanan v. Votruba (1898), 104 Ia. 672, 65 Am. St. 538, n.; Borden v. Fitch; 1 Freem. Judg. 37, 75 Ans. Conts. 51, n.; Green, 40 Mich. 244; Knapp v. Roche (1880), 82 N. Y. 366.

Void judgments will not be enjoined when the ground of invalidity clearly appears upon its face. Proceedings under, give no rights. Quod ab initio, etc.

Perjury; obtained by; no relief from. See Graver: 103; Borden v. Fitch: 267; Crouch, 30 Wis. 667. *Contra:* Barr v. Post: 265; *Ex dolo malo,* etc. *Concealment of facts.* Graver: 103; Borden: 267.

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Successive suits may be brought on. Hummer.

Set-off judgments. Simpson v. Hart (1814), 1 Johns. Ch. 91; 14 Johns. 63; Graves v. Woodbury (1843), 4 Hill, 559, 40 Am. Dec. 296; De Camp, 159 N. Y. 444, 70 Am. St. 570, n.; 1 High, Inj. 237, 1 Suth. Dam. 198-204; Barbour, 50 Ohio, 90; 20 L. R. A. 192, n.; Zinn, 47 W. Va. 45, 81 Am. St. 772; Coonan, 147 Calif. 218, 109 Am. St. 128-150, ext. n.

Assignments of; effect. Chilstrom, 127 Cal. 326, 78 Am. St. 46-57, ext. n.; *Assignatus,* etc.

Judgments are an entirety. Needham: 261; Weis, 75 Miss. 138, 65 Am. St. 594; Russell v. Shurtleff (Colo.); Enright, 86 Minn. 403, 91 Am. St. 359, ext. n. (judgment void as to some of the parties). The functions of a judgment to impart constructive notice found the rule that they are an entirety; but *contra* cases are found, and especially in those states that deny the functions of the common-law record.

Docketing of; what sufficient. Western Savings Co., 39 Or. 407, 87 Am. St. 660-673, ext n.

Lien of; effect of proceedings to renew or revive or extend the judgment. Wright, 92 Md. 645, 53 L. R. A. 702, ext. n.

Attach to what interests. Flint, 72 Neb. 34, 117 Am. St. 771-789, ext. n.

Judgments of inferior tribunals; how pleaded. Pierstoff v. Jorges (1893), 86 Wis. 128, 39 Am. St. 881; Crepps; Bliss, Pl. 303; Young, 52 Cal. 407 (duly rendered is not the equivalent of duly made or given under codes); Stiles v. Stewart (1834), 12 Wend. 473, 27 Am. Dec. 142-150, ext. n. (code rule; conclusions of law). § 53, Gr. & Rud.

Judgments, opinions, dicta. Distinctions. Cohens: 244; Houston: 245; Northern Bank v. Porter Tp.

Sister state judgments; force and effect of. Mills: 57; Haddock; Montgomery, 115 Ky. 156, 103 Am. St. 302-320, ext. n. See *Coram judice.*

Foreign judgments; doctrines concerning. Tremblay, 97 Me. 547, 94 Am. St. 521-553, ext. n. See *Res adjudicata.*

Judgments void and erroneous. Windsor: 1; Garland v. Davis: 60; Stafford, 123 N. C. 19, 68 Am. St. 815.

Reversed judgments; restitution under. *See* MONEY HAD AND RECEIVED; REVERSED JUDGMENTS.

Judgments can only be attacked in the court where entered, except for defects apparent on their face. Dixon, 106 Ga. 180. *See* Wonderly: 102.

Final judgments. Forgay v. Conrad, 6 How. 202; Latta, 150 U. S. 524; Dow, 148 Ill. 76, 39 Am. St. 156, n.; Ogden, 16 Utah, 440, 41 L. R. A. 305. *See* APPELLATE PROCEDURE; Hughes' Proc.

Estoppel to object to. See *Allegans.*

Generally: 23 Cyc. 623-1612; 14 *id.* 359-360 (Assumpsit); 2 Bouv. Dic. 25-36; Ans. Conts. 51-103.

JUDICIAL ADMISSIONS: *See* ADMISSIONS; 4 Wigm. Ev. 2588-2596; L.C. 34.

JUDICIAL FUNCTIONS: Cannot be delegated. Van Slyke; Flournoy; §§ 99, 100, Hughes' Proc.

Powers vested by a constitution cannot be divested by statutes. Marbury: 142; P. v. Maynard: 143; P. v. Hastings: 144.

JUDICIAL NOTICE: Lanfear: 181; Olive: 182. § 70, Hughes' Proc. *Cited,* §§ 53, 54, 274, 309, Gr. & Rud.

Cum adsunt testimonia rerum, quid opus est verbis: When the proofs of facts are present what need is there of words? *Res ipsa loquitur.*

Will be taken of the record in a case throughout. Hoyt, 104 Iowa, 257, 65 Am. St. 461, n.; Searls, 5 So. Dak. 325, 49 Am. St. 873, n. And of record in other cases, it is held. Denney, 144 Ind. 503, 31 L. R. A. 726; Haley, 20 Colo. 379, 383; Stallcup, 13 Wash. 141, 52 Am. St. 25. *See* 31 Colo. 81.

This court may take, of former proceedings before it. Dimmick, 194 U. S. 540.

And of all parts of a record, and of facts from these. Southern R. R., 100 Ga. 46, 40 L. R. A. 253; S. v. Bates (1900), 22 Utah, 65, 61 Pac. 905, 83 Am. St. 768, n.; Dimmick, 194 U. S. 540. *And of admissions in a record.* Dickson: 34. *And of issues.* Gay. *And of the whole record.* Sto. Pl. 10; Cothran.

A cause must be described before it exists or has merit. De non apparentibus; Non potest adduci, etc. And exactly like formal or dilatory matter. Kraner: 299. "What ought to be of record must be proved by record." Nixon: 127; Iverslie: 46; Munday: 79. Records are evidentiary —probative. § 27*a,* Hughes' Conts.; Outram: 25; Russell. Judicial notice cannot supply. Nixon. *See* Best, Evidence; Hannah.

Defenses must be pleaded; they cannot arise from. 180 U. S. 533-535: cases; J'Anson: 91; Munday: 79; Crepps: 113.

Jurisdictional facts must affirmatively appear of record. Kempe's Lessee: 115; Hannah: 128; Springer v. Shavender: 24. *Pleading matter of evidence forbidden.* Bliss, Pl. 177-199.

Judicial notice of localities and boundaries. Gunning, 189 Ill. 165, 82 Am. St. 433-447, ext. n. See *Probatis extremis præsumuntur media; Res ipsa loquitur.* Labatt, Master and Servant, 834.

Generally: 1 Gr. Ev. 4-7; 3 *id.* 269-272; 17 Cyc. 1-823; 16 *id.* 848-924; 1 Ell. Ev. 36-75; 4 Wigm. Ev. 2565-2582; 2 Bouv. Dic. 39-42; Suth. Stat. 601-607; Labatt, Mas. & Serv.; Lanfear: 181; Olive: 182.

Lager beer must be proved intoxicating. Potts v. S., — Tex. Cr. Ap. —, 7 L. R. A. (N. S.) 194: cases.

JUDICIAL OFFICERS: Limitations of their powers. S. v. Baughman: 268. *See* JURISDICTION; PLEADINGS; JUDGE.

Protection from, essential. Windsor: 1.

Immunity of, from liability. 2 Bouv. Dic. 22; Lange: 159.

Jurisdiction essential for protection. Savacool: 164.

JUDICIAL POWER: Defined; Bouv. Dic. *Proceedings.* Bouv. Dic.

JUDICIAL RECITALS: Ferguson: 264; Harrow.

JUDICIAL SALES: *See* EXECUTION SALES. Essentials. Bloom: 266; 2 Bouv. Dic. 51-53; Windsor: 1; Ransom: 122; Williamson: 65; 25 Cyc. 1-76; *See* COLLATERAL ATTACK.

Relief of purchasers upon amending judicial or execution sale. Cowper, 119 Ky. 401, 69 L. R. A. 33-59, ext. n.

JUDICIARY: Its creation is to afford remedies judicially. Windsor: 1; Chisholm; 2 Bouv. Dic.; And. Dic.

Its duties; importance of. Martin: 246; Cohens: 244.

Limitations of powers of. Windsor: 1; S. v. Baughman: 268.

Protection from, essential. Windsor: 1; S. v. Baughman: 268; Lange: 159; *Cujus est instituere,* etc. *See* DIVISION OF STATE POWER.

JURE NATURAE AEQUUM EST, NEminem cum alterius detrimento et injuria fieri locupletiorem; According to the laws of nature, it is just that no one should be enriched with detriment and injury to another (*i. e.*, at another's expense). Dig. 50, 17, 200; Cutter: 308; Bright v. Boyd; 29 Mo. 152; Ganong, 88 Mich. 53, 117 Am. St. 732 (right to recover where thing contracted for is destroyed before completion).

JURIES: 24 Cyc. 82-374.

JURISDICTIO EST: *See* JURISDICTION.

JURISDICTION: Is vested by organic law. *See* DIVISION OF STATE POWER. It is a ground and rudiment of law. §§ 56-63, 117, 165-170, Gr. & Rud.

Jurisdiction is the power to hear and decide. Its leading elements are of the person, of the subject matter, and of place. All are agreed on these requisites, but some courts add more by requiring certain pleadings, and a sufficient record evincing *coram judice* proceedings. If a court departs from fundamental justice after acquiring jurisdiction of the person and subject matter, such abuse or usurpation vitiates its proceedings, as in *Windsor:* 1. *See* Turney v. Barr.

Jurisdictio est potestas de publico introducta, cum necessitate juris dicendi: Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice. 10 Coke, 73; §§ 21, 25, 26, 28, 29, 38, 101, 124, 143, 177, 180, Hughes' Proc. *Cited,* §§ 60, 225, Gr. & Rud.

Tests of the validity of proceedings upon questions of collateral attack require technfcally accurate knowledge of all the elements of jurisdiction in each jurisdiction as it is comprehended locally. See *Audi alteram partem.*

Elements of jurisdiction. §§ 40, 126, 226, Gr. & Rud. The law and the pleadings. See *Consensus; Debile.*

Jurisdiction should be considered in relation to the conserving principles of procedure elsewhere defined. The next should be carefully considered for each jurisdiction.

Jurisdiction depends upon the general law, the process or appearance, the place or venue (Milligan's Case—territorial), *the pleadings, and proceedings in accordance with fundamental justice.* Windsor: 1; Adams v. Gill; Crain; Munday: 79; Borkenhagen (code): 81; Wisconsin Co. (code). *See* AD DAMNUM.

Pleadings are the juridical means of investing a court of record with jurisdiction of a subject-matter to adjudicate it. §§ 144, 169, 225, 237, 239, 240, 249-255, 272-279, Gr. & Rud. *See* CERTAINTY; PLEADINGS; § 1, Hughes' Proc.; Cruikshank: 232; Montana: 10*b*; Devine; Fish v. Cleland: 12*c*; Planing Mill Co.: 2*d*; *Fabula non judicium; De non apparentibus,* etc.; CONSTITUTIONALISM.

Jurisdictional facts are not presumed. § 118, Gr. & Rud.; *Verba fortius. See* CODES.

In a constitutionalism there must be pleadings and a record to bind a court. It can not go forth without star or compass upon an uncharted sea, and gather in or exclude acts of commission, and predicate a cause of action on such facts so found and declare a judgment thereon. *See* MAXIMS; *De non apparentibus,* etc. §§ 1, 23, 30, 39, 60-64, 89-103, 107, 191, 245, Hughes' Proc.

Consent can not confer jurisdiction, is a high and indispensable rule in a constitutionalism. The barriers against usurpation or abuse of power can not be contracted away; such a contract is void and illegal. The essential requirements of a government, its supreme law, and the elements of this, the conserving principles of procedure, can not be contracted away. § 18, Hughes' Conts.; Campbell v. Greer: 2*a*; People's Bk. v. Calhoun; *Pacta,* etc.; Sto. Pl. 10; Brown Jurisdic. 3; Milligan's Case. The divisions of state power are provisions by all for all, and therefore the parties to a record cannot contract away guarantees that are vital to a constitutionalism. If they could, constructive notice and other high policies would fail. Therefore the next rule:

Jurisdiction of subject matter can not be waived. It can not be conferred by consent. Conant, *sub* Mostyn: 274; 90 Am. St. 725. §§ 56-61, 117, 144, 169, 225, 237, 239, Gr. & Rud.

The law must authorize a court to act. Alica, 7 Wall. 571. And the pleadings must describe that matter. Washington R. R., 10 Wall. 303. See *Consensus.*

A matter must be juridically presented according to the forms of the law in order to invest a court with jurisdiction. Fast, 105 Mo. Ap. 694; § 118, Gr. & Rud.

Identification of a particular subject-matter is essential for. See IDENTIFICATION; §§ 182, 219, Gr. & Rud.; RES ADJUDICATA; COMITY OF COURTS; CORAM JUDICE; MERGER.

Generalities are uncertainties; these will not serve the requirements of jurisdiction. See CONCLUSIONS; Hanford: 86; Cruikshank: 232; §§ 99*a*, 118, 137, 226, Gr. & Rud.

A court is bound by its record in a constitutionalism; the requirements of this demand certainty. §§ 56-61, 239, 256, Gr. & Rud.; Windsor: 1; Munday: 79.

Importance of jurisdiction. §§ 60, 111-112, 118, 144, 165-170, 237-256, Gr. & Rud.

Jurisdiction is a weighty and significant word in a constitution, as may be gathered from the rationale of the division of state power. Marbury: 142; Dennett: 145; Flournoy: 146. And also from the rule, that where a constitution provides that one shall be tried by a jury without other designation or description, this means a common law jury. Work v. S.: 242. Now, this rule is but a part of what goes to make up a *coram judice* proceeding. How and by whom state power may be exercised, is the greatest question throughout procedure; and of course this attracts to it the means by which jurisdiction may be invested with power to proceed according to "due process of law" and according to the course of the common law, which is so pregnant with meaning in many relations. Galpin v. Page, 3 Sawyer, 93; Windsor: 1. The discussion of the means of investing the court with jurisdiction by pleadings, filed by the parties with the clerk, brings into view the division of state power, even in a court of record, and also the means of making and conserving the essential and exclusive evidence, that there was a wronged person before the court, who described his wrong according to the forms of the law, and filed this with the clerk according to "due course of law"—due process of law. *See* MANDATORY RECORD.

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Jurisdiction can only be exercised when a wronged person appears and properly complains, and this conclusion may be gathered from preambles and bills of right.

The wronged person, the wrong or defence described by the right pleading, in the right place, filed with the clerk, are of deep significance. The pleadings shall be filed with the clerk, is the very simple yet profound provision of codes. Brown, Jurisdic. 2, 2*a*. And from such views we must constantly construe. *Ad ea quæ frequentius; Verba intentionc.* Jurisdiction should be founded upon the right record. To this applies, "what ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud.; Crain; Planing Mill Co.: 2*d*.

From the above view numberless incidents and hundreds of rules of pleading, evidence and practice may be deduced; and more of these are effected by any change of definition of jurisdiction than can be easily enumerated.

A loose or shifting definition of jurisdiction renders government unstable, and consequently obstructed and impeded in extending the protection it guarantees, and without which it fails in its scheme. All stability and certainty in judicial proceeding depend upon respect for fixed and settled views of jurisdiction and the means by which it is exercised. These are comprehended within the above phrases, and therefore they are protected as constitutional implications. *Expressio eorum.* M'Culloch v. Maryland: 147.

In those states that have attempted to apportion the appellate jurisdiction between intermediate courts, as in New York, Indiana, Illinois, Missouri and Colorado, great confusion has resulted from this cause alone.

Amount involved is to be considered. Courts will not entertain trifles. De minimis, etc.; Sto. Pl. 500-502. Federal courts are limited by amounts and so are other courts in some cases. Error must be material in a court of errors.

Jurisdiction is a power flowing from a constitution—it is of organic origin. For its exercise the judiciary is created and maintained. Consequently all that relates to it and its exercise may not be affected, and certainly never obstructed, impaired or defeated, by statutes or codes. These may reasonably regulate and make uniform, but they can not defeat or destroy. *In præsentia majoris;* Indianapolis, etc. R. R.: 223; O'Connell: 224.

A court acquiring jurisdiction of a subject matter and of the person has the inherent power to proceed to an adjudication, if only respectful of fundamental principles of justice. *Expressio eorum.* §§ 31, 39, Hughes' Proc.

Continuity of jurisdiction presumed. § 308, Gr. & Rud. Convenience requires this. § 53, Gr. & Rud.

Therefore statutes and codes are thus greatly limited in their powers to interfere with what relates to the "due administration of justice." From this viewpoint those statutes which provide that where there is no prayer for relief, a court can enter no judgment, should be disregarded. § 28, Hughes' Proc.

The requirement for, is a first demand in appellate procedure: Campbell: 2; a first essential to resist collateral attack; *Debile fundamentum,* etc.; also in *res adjudicata,* where the rule is, the proceedings must be *coram judice;* also for the division of state power, and for "due process of law." *Audi alteram partem.* Elsewhere other reasons are enumerated. *See* CERTAINTY; PROCEDURE; CONSTITUTIONAL LAW; CONSTRUCTION. §§ 83-123, Gr. & Rud.

Jurisdiction is the very essence of a due process of law proceeding. For all these matters it must appear of record, and thus it involves the rule requiring the record. Iverslie: 46: cases. § 104, Gr. & Rud.

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of the cause upon the pleadings and the evidence." Ill. R. R. v. Adams (1901), 180 U. S. 28, 471, 533.

"Courts of appellate jurisdiction only" can acquire jurisdiction in no other way than by the record submitted to them. Lane v. Dorman; Planing Mill Co.: 2*d*.

Campbell: 2. *See* APPELLATE PROCEDURE; CERTAINTY; BILL OF EXCEPTIONS.

Jurisdiction must not be usurped; it must not be taken of a matter not presented or described. See ALLEGATIONS; DESCRIPTION.

Certainty of the record is essential to confer jurisdiction upon any court. De non apparentibus; R. v. Wheatley: 19; Moore v. C.: 21; Cruikshank: 232.

Collateral attack overwhelms coram non judice and uncertain proceedings whenever they are called in question and especially whenever they are offered to prove title to property sold at execution, judicial or tax sales.

Res adjudicata (former jeopardy—estoppel of record) depends on coram judice and certain proceedings.

Outram: 25: Cromwell: 26. See *Res adjudicata;* CERTAINTY.

Division of state power is a question of jurisdiction. It depends on certainty.

Due process of law profoundly involves jurisdiction. Murray: 219; Cruikshank: 232. This, like *res adjudicata* and requirements to resist collateral attack, depends on the *coram judice* proceeding.

Removal of causes likewise involves jurisdiction throughout. Before a cause can be removed from one court to another there must be a cause stated or defined with certainty, so that jurisdiction may attach to some one certain thing. Campbell: 2.

C. & O. R. R. v. Dixon (1900), 179 U. S. 131 (removal of causes demands certainty). *Expressio unius,* etc. *See* ALLEGATION; CAUSE OF ACTION; Buck v. Colbath.

Comity of courts requirements likewise involve jurisdiction. To know what one court has jurisdiction of is often an important question. Therefore the record must show this.

Expressio unius, etc. Freeman: 287.

Justification requirements of officials exercising official authority likewise involve jurisdiction. Therefore it must appear from the right record and with certainty.

Savacool: 164; Howard v. S.: 166.

Conclusion of law will not serve certainty. § 238, Gr. & Rud.

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Election of remedies likewise involves jurisdiction. *See* ELECTION.

Illegal subject-matter will not attract jurisdiction.

See *Salus; In pari; Fabula non judicium;* CONTRACTS; Beaumont: 367; Weltmer; §§ 285, 292, Gr. & Rud.

Constructive notice depends on jurisdiction. No one, either a party to or a third person, is presumed to be present and attend a *coram non judice* proceeding. Proceedings must be at the right forum at the right time and in the right way. Therefore consent will not confer jurisdiction of subject-matter. Windsor: 1.

Construction gives life, force and stability to law. Cujus est instituere, etc. The rules of the Code, elsewhere mentioned, are not compatible with a certain and definite theory.

See MAXIMS: Hughes' Proc.; Hume; Russell; CONSTRUCTION; *Ignorantia legis neminem excusat; Verba fortius; De non apparentibus;* CONSTITUTIONALISM.

Abatement or dilatory matter involves the most technical considerations of jurisdiction. This must be viewed from considerations of Abatement, *Consensus tollit errorem,* and bills of exceptions. *See* ASSIGNMENT OF ERRORS.

See *De minimis non curat lex;* L. C. 290a-299.

Abatement or dilatory matter may be waived or contracted away. Otherwise as to essential matter. The *coram non judice* proceeding calls for no appearance, objection or exception. Windsor: 1. Courts *sua sponte* take notice of jurisdictional defects relating to subject matter. §§ 7-12, Hughes' Proc.

The mandatory record and its essentiality to confer jurisdiction of subject-matter, is one of the profoundest rules of both pleading and evidence. It might be called the subject-matter record in contradistinction to the bill of exceptions (statutory record).

These are elsewhere defined. They tremendously influence jurisdictional inquiries.

See MANDATORY RECORD; BILL OF EXCEPTIONS; *De non apparentibus;* CERTAINTY; CONSTITUTIONALISM.

In connection with the foregoing the conserving principles of procedure, discussed in §§ 83-123, *Gr. & Rud., should be considered;* also appellate procedure, collateral attack, *res adjudicata,* the division of state power and maxims.

A court acquires jurisdiction from its record. Its power to receive evidence depends on its record. Fish v. Cleland: 12c; Adams v. Gill; *Frustra probatur,* etc.; ALLEGATIONS; ISSUES; CAUSE OF ACTION.

Jurisdictional facts must appear of record. Bro. Max. 97; L.C. 1-24; Thomas v. Board (U. S.); will not do in caption. Jackson, 33 U. S. 148, 12 Cyc. 196-254.

Inferior courts; jurisdictional facts must affirmatively appear in the grand record. Crepps: 113.

Territorial jurisdiction. Milligan's Case. A crime must be prosecuted where committed. R. v. Lewis: 173; R. v. Keyn: 171; C. v. Macloon: 172; Bro. Max. 101. *Crimes are domestic.* C. v. Macloon: 172. *And so is process.* Ableman v. Booth.

It must be exercised in the right sovereignty. Mostyn: 274; Ableman; Pennoyer: 58; Harkness: 152.

A judge out of his jurisdiction is no judge. Marshalsea Case; Lange: 159.

Jurisdiction of one thing is not of another. Expressio unius. There shall be no departure. *See* DEPARTURE; CONTINUITY; VARIANCE.

A jurisdiction vested by a constitution cannot be divested by a statute. Expressio unius; Suth. Stat. 397; Brown, Jurisdic. 14; P. v. Maynard: 143; P. v. Hastings: 144.

No statute limitation of suability can defeat a jurisdiction given by the constitution. Blake v. McClung; *In præsentia majoris.*

Jurisdiction must be exercised at the right time and place. *See* TERMS OF COURT; Blair: 170; Drew v. Davis; Westfall v. Preston; Fletcher v. Trewalla: 18; Milligan's Case (territorial); Little v. Merrill.

Jurisdiction depends on: 1st. The Law. S. v. Baughman: 268. 2d. Pleadings. *Fabula non judicium;* Munday: 79; Jordan v. Brown; *De non apparentibus.*

There must be a cause of action in reality (in esse). Fabula non judicium; Wonderly: 102; §§ 75, 224, 329, 353, Hughes' Proc.

Reality of a cause of action is essential to attract jurisdiction. S. v. Baughman. See *Coram judice;* SHAM PLEADINGS; §§ 5-5*b*, Hughes' Proc.; Vinson, 64 Ark. 453, 39 L. R. A. 415. *See* also CAUSE OF ACTION. § 353, Hughes' Proc.

"A cause of action" must exist in reality; it must be legal, and it must be described. It may be inquired after. Mills: 57; 176 U. S. 356; Wonderly; *Ex dolo malo,* etc. *See* COMPROMISE; *Fabula.*

A wrong known to the laws of the land must be described. Cruikshank: 232; S. v. Baughman: 268. *See* ALLEGATIONS; DESCRIPTION; CERTAINTY.

Dead issues will not attract jurisdiction, it is a contempt to present them. P. v. Horan, 34 Colo. 336, 114 Am. St. 163.

The general demurrer, the motion in arrest and objections upon collateral attack probe after a subject-matter and jurisdiction of it forever. This cannot be waived, and codes so provide. Hughes' Proc. *See* CODES; DEMURRER; COLLATERAL ATTACK.

By the allegations of that subject-matter and denials thereof, if any, all rights and powers of a court are measured and tested. Frustra probatur, etc.; Shutte: 291; *Quod ab initio,* etc.

A record of such matter is essential to empower a court to bring in, admit and consider evidence, or the rights of the parties. Adams v. Gill; Fish v. Cleland: 12c.

Assessing for taxation is quasi-judicial, and must be exercised after the manner of judicial work. Drew v. Davis; Tilton: 133 (assessment roll must describe property, owner and value); P. v. Hastings: 144 (assessor only can assess).

Jurisdiction of superior court cannot be ousted by contract. *See* AWARDS; ARBITRATION; Scott v. Avery.

Parties: real, *bona fide,* essential to confer jurisdiction. Watkins v. S.; Williams: 93; *Audi alteram partem.* § 353, Hughes' Proc.

A party in interest and with an interest is essential. Nihil dat qui non habet. *See* PARTIES.

Duty of courts to exercise according to the record facts, and neither to usurp nor decline jurisdiction. Cohens: 244; Martin v. Hunter: 246; Harvey v. Richards: 32.

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Protection from usurpation by *certiorari*, prohibition and *habeas corpus* is often extended.

Usurpation renders proceedings coram non judice. Windsor. And subject to collateral attack. *See* COLLATERAL ATTACK; ISSUES.

Contracts; courts cannot make for parties. Cutter: 308; Barnard; Williams v. Stoll. *See* DEPARTURE. Appeals divest. *See* APPEAL; ABUSE OF POWER. Windsor.

Excess of jurisdiction; effect. Bradley v. Fisher; Crepps: 113; Windsor. See *Ultra vires;* USURPATION.

Jurisdiction of state and of federal courts. Tarble's Case: 247. *See* FEDERAL QUESTION; CONSUL.

Probate jurisdiction depends on death of decedent. Springer v. Shavender: 24; *Fabula.*

False allegations will not confer. Graver: 103; Wonderly: 102; *Fabula.*

Superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal. State, 103 Wis. 591, 51 L. R. A. 33-71, ext. n.

Concurrent and conflicting. 11 Cyc. 982-1020.

Duty of courts to construe for Boni judicis, etc. Aggressions of federal courts (*ampliare jurisdictionem*), 40 Wis. 202.

Jurisdiction attaching empowers a court to proceed to a final determination; subsequently accruing disabilities will not defeat it, *e. g.* if a cross bill is filed, and then the bill is dismissed, still the court may proceed and determine the matter presented by the cross bill. *See* CROSS COMPLAINT.

Generally: §§ 84-123, Gr. & Rud. Brown, Bailey, Wells, on Jurisdiction; 2 Bouv. Dic. 57-62; And. Dic. Defined, 1 Pom. Eq. 129 n. 11 Cyc. 633-1020 (Courts); 1 Freem. Judg. 117-120. See *Coram judice; Fabula non judicium; Audi alteram partem;* JUDGMENTS; DIVISION OF STATE POWER.

JURIS PRAECEPTA SUNT HAEC, honeste vivere, alterum non lædere, suum cuique tribuere: These are the precepts of the law, to live honorably, to hurt nobody, to render to every one his due. Inst. 1, 1, 3; 1 Bl. Com. 39; Title Page, Bro. Max. *See* JUSTINIAN; Barbier; S. v. Brown.

Cited, §§ 10, 52, Gr. & Rud.

"Alterum non lædere" a precept from Ulpian. Burdick's Torts, 3. Adopted by English Church Catechism.

JURISPRUDENTIA EST DIVINARUM atque humanarum rerum notitia; justi atque injusti scientia: Jurisprudence is the knowledge of things divine and human: the science of the just and the unjust. Dig. 1, 1, 10, 2; Inst. 1, 1, 1; Brac. 3. *See* CHRISTIANITY; *Summa ratio;* Church v. U. S.

JUROR: *The right to trial by jury includes the necessary, inseparable and inalienable right to a fair, impartial and unbiased juror.* P. v. Parker (1886), 60 Mich. 277, 1 Am. St. 501-526, n.; Coughlin, 144 Ill. 140, 19 L. R. A. 57: cases; Thiede, 159 U. S. 510, 40 L. ed. 237, n.

Who are related by affinity. S. v. Wall (1899), 41 Fla. 463, 79 Am. St. 195-205, ext. n.; 56 Am. Dec. 293, 294.

Rejection of, for bias. C. v. Brown (1889), 147 Mass. 585, 9 Am. St. 744-760, ext. n., 1 L. R. A. 620; Gaff v. S. (1900), 155 Ind. 277, 80 Am. St. 235. *Competency of.* 1 Bish. Cr. Proc. 890-894, 930-945;

Juror.—

Whart. Cr. Pl. & Pr. 605-695; Clark, Crim. Proc. 158-168.

Disqualification as a ground for a new trial. Jewell, 84 Me. 304, 18 L. R. A. 473-479, ext. n.

Must understand English language. Whart. Cr. Pl. & Pr. 699. *Contra,* Simpson, 5 Colo. 65. On principle no statute can authorize an incompetent juror. L.C. 224.

Peremptory challenges. Harrison v. U. S. (1896), 163 U. S. 140, 41 L. ed. 140, n. *Objections after sworn.* 1 Bish. Cr. Proc. 646-649; Whart. Cr. Pl. & Pr. 672-683.

Jury. Condition imposed upon right of; when valid; fees demanded. Eckrich, 176 Mo. 621, 98 Am. St. 517-544, ext. n. Meaning of. § 33, Hughes' Proc.; Work: 242.

Separation of, during trial *prima facie* presumed prejudicial. Gamble v. S., 44 Fla. 429, 103 Am. St. 150-171, ext. n. *See* PRESENCE OF THE PRISONER; JURIES; 24 Cyc. 82-374.

JUS PUBLICUM PRIVATORUM PACTIS mutari non potest: A public right cannot be changed by agreement of private parties. *Pacta privatorum,* etc.; 180 U. S. 476 (where a status is declared as essential for capacity to contract, this is a fixed limitation, *e. g.* infants or married women); Ans. Conts. 328; 68 Conn. 533-537, 37 Atl. 420. *See* WAIVER; LIMITATIONS; *Salus,* etc.; *Pacta,* etc. *Cited,* §§ 18, 25, Hughes' Conts.

Accordingly consent will not confer jurisdiction of subject matter. *Id quod nostrum,* etc.; *Consensus,* etc. *See* WAIVER; French v. Miller; Hegarty v. Shine. *In pari;* CONTRACTS.

JUSTICE: Maxims of. See *Jus; Justitia; Jurisprudentia; Lex;* Bouv. Dic.: MAXIMS.

Department of justice. 2 Bouv. Dic. 81.

JUSTICES OF THE PEACE: Are inferior statutory tribunals and are governed by all of the strictness of these and agreeably to *Expressio unius* and all that this implies. *See* JURISDICTION; White: 130; Walker: 118: cases.

The procedure in such tribunals is greatly affected by the presumption of regularity. *Omnia præsumuntur rite.* Crepps: 113; Piper: 114; Calder; Clarke; Iverslie: 46; Nixon: 127; Miller v. Horton; Galpin: 63, 64; Kempe's Lessee: 115; 74 Am. St. 854.

Must issue process conformably to their records. Moore v. Watts (1820), Breese (Ill.) 18.

Must keep within their jurisdictions. Lange: 159: cases; Bro. Max. 88; White v. Wagar. *See* COURTS.

Justification of; how pleaded. Crepps: 113; Rice v. Travis.

Amendments of records of, not permitted. Fulton v. S. (1899), 103 Wis. 238, 74 Am. St. 854, n.; McCormick Co., 11 S. Dak. 427, 74 Am. St. 820.

Statutes regulating procedure before justices of the peace are construed to harmonize with other laws. Bates: 225; End. Stat. 182; *Concordare leges legibus.*

Must inquire after, establish and make of record jurisdictional facts; upon this depends their protection. About this great power is conferred; and where great power is conferred, consequently great liabilities are imposed. Crepps: 113. In a superior court the clerk makes a record, and the superior judge has a right to presume it correct and regular; hence he is not liable, like a justice, for abuse of power.

Generally: 2 Bouv. Dic. 81; 8 Mews' E. C. L. 540-697; 24 Cyc. 383-790.

JUSTIFICATION: Justification defenses must be certain. J'Anson: 91; Woodridge v. Connor; Smith v. Shirley, 3 C. B. 142 (54 E. C. L. R.). *Cited*, Bro. Max. 435; Virginia Coupon Cases: 285*a*. *Must be as certain as an indictment.* J'Anson: 91; Bro. Max. 435, 439. *Must be pleaded.* 2 Bouv. Dic. 87; Hopper v. Covington; Tarble's Case: 247; Kollock; McKyring: 33 (new matter).

Record is essential for. Moore, Breese (Ill.) 18. A tax collector must set out his warrant. Butler, 88 Ill. 575, 578; West, 120 Ala. 92, 74 Am. St. 21; U. S. v. Kirby.

Justification matter in trespass must be pleaded. It is not admissible under the general issue. Finch v. Alston (1832), 2 Stew. & Por. (Ala.) 83, 23 Am. Dec. 299. *Contra*, Barrett v. Mobile (1900), 129 Ala. 179, 87 Am. St. 54, n.

Justification in slander and libel. J'Anson: 91; Rutherford, 180 Mass. 289, 91 Am. St. 282-309, ext. n.

Return of process essential for. Failing to do this, the officer is a trespasser *ab initio*. Anderson v. Cowles (1899), 72 Conn. 335; 77 Am. St. 310: cases, *quoting* 6 Bac. Abr. (Tres. B.); Dehm v. Hinman; Monroe v. Merrill, 6 Gray, 238; Wright v. Marvin, 59 Vt. 457; Williams v. Ives, 25 Conn. 568; Pratt v. Pond, 45 Conn. 386; Toby v. Reed, 9 Conn. 216; Buller's Nisi Prius, 23; Six Carpenters' Case: 165: cases; Howard v. S.: 166.

Facts must be pleaded, as in J'Anson. Price v. Seeley (1843), 8 Clark & Fin. 28, 8 Eng. Reprint 651, 1 Lead. Cr. Cas. (B. & H.) 177. *Cited*, 92 Me. 400, 44 L. R. A. 676. 1 Bish. Crim. Proc. 162, 1 Wat. Tres. 2, 1 Add. Torts, 810-841; 1 Gr. Ev. 123; Mure v. Kaye (1811), 4 Taunt. 34, 1 Wat. Tres. 390, 315, 371; 2 Add. Torts, 841-851; Bro. Max. 435, 439; Deitsch v. Wiggins; Rice v. Travis.

Generally the *coram judice* proceeding is essential for. Also a record evincing this. § 99, Gr. & Rud. This must be pleaded. § 132, Gr. & Rud. *Ignorantia.*

Generally: Bouv. Dic. 86; And. Dic. 587.

JUSTINIAN: Maxims of. See *Juris præcepta*, etc. Tribonian changed maxims to enlarge prerogatives. P. 2, Hughes' Proc. *See* § 12, Gr. & Rud. Protected legal literature. §§ 76, 112, 134, 144, 149, 163, Gr. & Rud.

JUSTITIA NEMINI NEGANDA EST: Justice is denied to no one. *See* EQUAL AND UNIFORM LAW.

KANSAS CITY R. R. v. Riley: L.C. 357.

KEANE v. CANNOVAN (1863), 21 Cal. 291, 82 Am. Dec. 738, n. Pleadings; when admissible as evidence. Dickson: 34; Boileau: 43; Crater.

Description of lands in tax deeds must be certain. Tilton; Stout; Bloom: 266; 1 Cool. Tax. 448 (burden is on tax purchaser to prove each step. 2 *id.* 916-926. Deputron: 121; *Actore non probante*, etc.

KEECH (d. WARNE) v. HALL (1778), 1 Doug. 21-23, 1 Smith, L. C. 904-927, ext. n., 8th ed., 11th ed. (reviews English cases), 18 Rul. Cas. 123, 2 Wat. Tres. 743, 2 Gr. Ev. 329, Bro. Max. 359, 1 Chit. Conts. 454, 2 *id.* 1396, 2 Add. 729, 1024, Jones, Mort. 667, 1066, 2 Wash. R. P. 101, 174, 6 Mews' E. C. L. 1489; 8 *id.* 974. *Cited*, §§ 326, 330, Hughes' Proc.

Mortgagee and mortgagor. Mortgagee may eject, without notice, a tenant claiming under lease from mortgagor, granted after mortgage and behind mortgagee's back. *See* Moss v. Gallimore, Sm. Lead. Cas. Mortgagee may take immediate possession. 2 Wat. Tres. 776: cases. Nature

Keech.—

of mortgagor's estate at common law and the remedies available by him to recover possession or otherwise obtain his rights by suit. Cotton, 85 Ala. 175, 7 Am. St. 29-34, ext. n., 2 Wat. Tres. 772.

Equitable mortgages. Deposit of title deeds; when these constitute. Hutzler, 26 S. C. 136, 4 Am. St. 687-708, ext. n.; Russell, Wh. & Tud. Lead. Eq. Cas.

Absolute deed as a mortgage. Notes, 4 Am. St. 407; Howard v. Harris. *See* ORAL EVIDENCE.

KEECH v. SANDFORD (Rumford Market Case) (1726), Sel. Cas. Ch. 61, 22 Eng. Reprint, 629, 1 Lead. Eq. Cas. (Wh. & T.) 48-73, ext. n., 15 Rul. Cas. 455, 6 Mews' E. C. L. 317, 14 *id.* 444, 446, Bisph., Pom., Beach, Adams; Mech. Ag.; Marsh & Skyles; Perry, Trusts, Dev. Deeds, Brown, Jurisdic. 21*c*, 201; 4 Kent, 368*b*.

Cited, §§ 96, 105, 106, 148, Hughes' Conts.; §§ 20, 150, 158, 159, 167, 183, 219, Hughes' Proc.; §§ 40, 52, 70, 280, 282, 303, Gr. & Rud.

Keech stated: An infant was lessee of a market, held by his guardian in trust, who applied to the lessor for a renewal of the lease, which the lessor refused to the infant but instead let the market to the guardian. Afterward the infant sued the guardian for a conveyance of the premises. *Held*, the infant could recover. When a lease is renewed by a trustee in his own name, the beneficiaries under the trust are entitled to have the new lease held in trust for them.

No one can act where his integrity and his interests are in conflict. Dimes: 176.

Nemo debet esse judex: No man can be judge of his own dispute. *See* Pitt, and Fox v. Macreth, White & Tud. Lead. Eq. Cas.; Michoud; Farnam; Nutton v. Wilson (1889), 22 Q.B. Div. 744-749, 16 Rul. Cas. 691; Leathers, 117 Mich. 277, 45 L. R. A. 33-53, ext. n. (real estate broker); Tyler, 128 Ill. 136, 15 Am. St. 97, 4 L. R. A. 218, n.

Idem agens et patiens esse non potest; Nemo debet esse judex; Lucrum facere, etc.; *Lex est sanctio sancta*, etc.; *Summa ratio.* Atwood, 148 Mich. 224, 118 Am. St. 576. *In præsentia.*

Keech denied in S. v. Walsen (1892), 17 Colo. 170, 15 L. R. A. 456, n. *Walsen* was denied in *S. v. McFetridge* (1893), 84 Wis. 472, 20 L. R. A. 223, n. (state treasurer cannot speculate with state funds).

Trustee or agent can, at no time, take advantage of trust information. Coles v. Trecothick; Adams, Eq. 217; Kimball, 122 Mich. 160, 80 Am. St. 548-558, ext. n. (agent cannot buy principal's property). Bish. Conts. 880. And of course an attorney cannot. *Tyrrell v. Bank of London* (1862), 10 H. L. Cas. 26, 11 Eng. Reprint, 934, 2 Rul. Cas. 496, Bisph. Eq. 235-238, Cook, Stock, 651; Warren (1893), 95 Mich. 185, 35 Am. St. 554, n.; Rogers v. R. E. L. Co. (1881), 3 McCrary, 76-95, 9 Fed. Rep. 721, ext. n. (an attorney rarely if ever can contract in relation to the subject-matter of the litigation. 83 Am. St. 157-180, ext. n.); Cunningham, 37 Kan. 477, 1 Am. St. 257 (attorney's acts, if adverse to client, are void); Hazleton v. Sheckells; Elmore, 143 Ill. 513, 21 L. R. A. 366: cases; 4 Kent, 449, n., 1 Per. Trusts, 202, 1 Beach, Eq. 123, Adams, 184; Burnham v. Heselton (1890), 82 Me. 495, 9 L. R. A. 90, n. (contracts with; voidable. 83 Am. St. 157-180, ext. n.); Cassem v. Heustis, 220 Ill. 208, 94 Am. St.

Keech.—
160; 1 Page, Conts. 180: cases. Burden is on agent to show contract was fair. 202 U. S. 25.

Promoters of corporations, secret contracts of. 2 Beach, Conts. 1519; Cook on Stockh. 651; Cook on Corporations, 1270, 1276, 1281; Peitsch, 123 Wis. 647, 107 Am. St. 1017.

Frauds of directors and promoters. 2 Cook, Corp. 643-664.

The division of state, of political power, is a safeguard in government. In states where judges appoint their clerks, the protection designed is often much impaired. In Colorado great disorders have arisen in many courts, and especially where the fees of the clerk were considerable, the clerk being selected with a view to the division of fees with the appointing power.

Notary public cannot administer oath to co-partner in a matter of firm business. Smalley v. Bodinus (1899), 120 Mich. 363, 77 Am. St. 602, n.

Keech expresses part of one of the great rules of law. Like the *"Squib Case,"* it can be explicated in many directions and for many subjects. It is a great fundamental underlying principle in procedure, contracts, agency, trusts and trustees, equity, judicial, execution and auction sales. It should be well comprehended, and especially for its lofty inculcations, for it presents moral aspects of jurisprudence and its enthronement and triumphant vindication of a great admonition: "Ye cannot serve God and mammon."

A venerable and everlasting truth briefly stated is nevertheless the inspiration of volumes of matter. A little light may illumine great extents. "Behold how a little leaven leaveneth the whole loaf."

Davoue v. Fanning (1816), 2 Johns. Ch. (N. Y.) 252, Zinn's L. C. Trusts, 1-18, Mech., Sto., Whart. Ag., Sto., Bisph., Beach, Eq., 2 Kent, 231, Cool. Torts, 613, Gr. Pub. Pol. 303, 1 Pars. Conts. 91-142, 2 Pom. Eq., q. v., 2 Wash. R. P. 73, Per. Trusts, Adams, Eq.; §§ 158*a*, 159, Hughes' Proc.

Agent or trustee cannot use his trust for his own benefit. Keech; Michoud; Farnam: 97; Green v. Winter (1814), 1 Johns. Ch. 27, 36, 7 Am. Dec. 475.

Oliver v. Piatt (1845), 3 How. 333, 11 L. ed. 622, note to Zinn's Lead. Cas. Trusts, 18-42, Mech., Whart., Sto. Ag., Bigl. Fraud, 315, Bisph. Eq., Sto.; 2 Wash. R. P. 493, 523, 3 *id.* 480 (trustee cannot speculate in the subject of his trust).

Public officers are governed by the same rule. They cannot deal with themselves as private persons. Taxpayers, etc., v. Binning (1904), 36 Chicago Legal News, 220: cases (sale is void and town is not liable for goods consumed); Goodyear v. Brown (1893), 155 Pa. 514, 523, 35 Am. St. 903, n., 20 L. R. A. 838, 55 L. R. A. 162, n., 1 Beach, Pub. Corp. 197: cases; Brown v. Lindsay (1874), 35 U. C. (Q.B.) 509 (a mayor cannot lease, through the town council of which he is a member, a park), 1 Dill. Mun. Corp. 444; Macon, 60 Ga. 221; *stated*, Dill. Mun. Corp. 444. A sheriff cannot both buy and sell at an execution or judicial sale. Whart. Conts. 404, 413; Herm. Ex. 209; 2 Freem. Ex. 292: cases; 1 Page, 176-200.

Keech.—
Director of a school district cannot sit and assist in auditing claim of his own. Shakespear, 77 Cal. 638, 11 Am. St. 327. A public officer cannot contract with the public body which he represents. Board Com., 131 Ind. 370, 15 L. R. A. 520, n.; Nutton v. Wilson (1889), 16 Rul. Cas. 691-701 (public trustees, officers).

Agent or trustee must account for profits without regard to losses and risks. Whart. Ag. 336; 1 Beach, Eq. 114-147. Agent cannot pay his debts with principal's funds, nor loan them to pay his debt out of interest. Dorrah, 73 Miss. 787, 32 L. R. A. 631; Port, 36 Ind. 60 (director of a corporation). *Trustee; chargeable with interest, when.* Burdick, 39 L. J. Ch. 369-374, L. R. 5 Ch. 233, 18 W. R. 387, 14 Rul. Cas. 565-577.

Auctioneers and persons conducting sales; right to make bids. Caswell, 65 Vt. 457, 20 L. R. A. 503-509, n.

Pledgee or promisee of chattel to secure a debt cannot buy it. Middlesex Bank v. Minot (1842), 4 Met. 325; Morgan, 3 Colo. 551-553; Sto. Bail. 310; Robertson, 152 U. S. 673, 38 L. ed. 592, n. (agent to sell cannot buy). Contracts affecting public and private service; dereliction of duty. Greenh. Pub. Pol. 292-326, Herm. Estop. 209.

A disloyal agent can recover no compensation. He forfeits this. Mech. Ag. 798; Clauser, 84 Pa. St. 51, 54; note, 17 Am. Dec. 274; Walker, 98 Mass. 348, 93 Am. Dec. 168, n.; Gibson's Case, 1 Bland, Ch. 138, 17 Am. Dec. 257-274, n.

Third persons chargeable with knowledge. One dealing with an agent and knowing that his interests are in conflict with those of his principal, must ascertain that the acts of the agent are authorized by his principal. Farrington, 120 Mass. 406, 15 Am. St. 222, n.

Third persons with knowledge, chargeable. If one gains knowledge from a trustee or officer in violation of his trust, and speculates upon this knowledge, each is liable for the profits so realized. Boston, 150 Mass. 461, 15 Am. St. 230, n., 6 L. R. A. 629.

Sales under powers in mortgages and trust deeds; validity of power; death of mortgagor; purchasers. Houston, 80 Miss. 31, 92 Am. St. 565-597, ext. n.

Corporation directors cannot act where interested. Scott, 97 Tex. 75, 104 Am. St. 835-856, ext. n.

Stockholder and director in two corporations may represent each as agent in making contracts between them. Aldine Mfg. Co., 129 Mich. 240; Adams Min. Co., 26 Mich. 73; Booth, 55 Md. 419; Twin-Lick, 91 U. S. 587; San Diego R. R., 112 Cal. 53, 33 L. R. A. 788, ext. n.

Stockholder cannot acknowledge a deed in which the corporation is interested. Ogden, 196 Ill. 554, 89 Am. St. 330, n.

Right of co-tenant, agent or person standing in other fiduciary relation to relocate a mining claim for his own benefit to the exclusion of other party. McCarthy, 11 S. Dak. 362, 12 S. Dak. 7, 50 L. R. A. 184, n.

Validity of contracts with public officers as affected by illegality of object or consideration. Washington Co. v. Krutz (1902), 56 C. C. A. 1-30, ext. n.

Agent must not speculate at his principal's expense. Holmes, 88 Minn. 213, 60 L. R. A. 734, n.

Directors—trustees of corporations cannot prefer debts of. City Nat. Bank (1903), 35 Ind. App. 562, 69 N. E. 206: cases.

KEIGHLER v. SAVAGE MFG. CO. (1858), 12 Md. 383, 71 Am. Dec. 600, n. Denials in answer must be certain. Poor: 37.

KEIR v. LEEMAN: *See* COMPOUNDING OFFENSES; Smith, Conts. 232; Whart. 151*a*. *Cited*, § 91, Hughes' Conts.; §§ 154, 156, 158, Hughes' Proc.

KELLEY v. KEMMINGWAY: L.C. 304.

KELLY v. BEMIS: L.C. 285.

KEMBLE v. FARREN: L.C. 391.

KEMPE'S LESSEE v. KENNEDY: L.C. 115.

KENNEY v. GREER (1851), 13 Ill. 432, *citing* Borden: 267 and Bloom: 266.

KENT. Biography: And. Dic. 388. *See* Bartlett: 6. Great decisions of: Dash: 237*a*; Bartlett: 6.

KENTUCKY: Organization of. Bouv. Dic.

KENTUCKY v. POWERS (1906), 201 U. S. 1-40.

Removal of causes from state to federal courts on grounds of local prejudice, under § 641, R. S. U. S. *Strauder* and other cases discussed.

KERNEY v. LONDON B. R.: L.C. 211.

KERN v. HUIDEKOPER (1880), 103 U. S. 485-494. *Cited*, § 85, Gr. & Rud.

Removal of causes. Effect of, is to divest the state court of jurisdiction of subject-matter, which was not waived by further appearance and trying of the cause, if the proceedings were duly resisted. At one's election such proceeding of the state court is usurpation, and it will be so treated by the federal court if the moving party afterwards enters the cause therein. Further proceedings by the state court are not merely *erroneous*, but are *absolutely void*.

Federal courts will protect their jurisdiction by injunction and otherwise. Dietzsch v. Huidekoper, 103 U. S. 494. Likewise enforce their decrees by ancillary proceedings in their own way. Gunter v. R. R. (1906), 200 U. S. 273. *In præsentia.*

State courts cannot make rules of procedure for federal courts.

KEWAUNEE CO. v. DECKER: L.C. 29.

KIDD v. BATES (1897), 120 Ala. 79, 74 Am. St. 17 (statutes in derogation of the common law are strictly construed). C. v. Hess: 215.

KIDNAPPING: Distinguished from false imprisonment. 6 Am. C. Rep. 355. *See* 2 Bish. Cr. Proc. 688-695; 2 Bouv. Dic. 91; And. Dic.; McClain, C. L. 489-492; 24 Cyc. 796-802.

KING OR QUEEN: R. stands for *Rex* or *Regina*. Regnal table of English sovereigns. And. Dic. 590; Bouv. Dic., 14th ed. *Sub*, S. v. Moore; Hughes' Tech. The king can do no wrong. See *Rex non potest peccare;* SOVEREIGNTY.

KING'S EVIDENCE: Bouv. Dic.

KINGSTON'S CASE: L.C. 76.

KING v. BALDWIN: L.C. 334*b*.

KING v. CHICAGO, M. & ST. PAUL R. R. (1900), 80 Minn. 83, 81 Am. St. 283, 50 L. R. A. 161-168, ext. n. *Cites* Bendernagle, *cited*, §§ 40, 53, Gr. & Rud.

Splitting causes of action; injury to person and property by same act. These are different items of the same cause, and they may be joined. Emerson v. Nash (1905), 124 Wis. 369, 109 Am. St. 944.

Injury to different rights are different causes. Watson v. R. R. (1894), 8 Tex. Civ. App. 144, 27 S. W. 924; Brunsden v. Humphrey (1884), L. R. 14 Q. B. Div. 141, *stated*, 50 L. R. A. 161; Boerum v. Taylor, 19 Conn. 122; Emerson v. Nash.

KING v. MASON (1866), 42 Ills. 223, 89 Am. Dec. 426-436, ext. n.

One can not ratify in part and disaffirm in part.

King.—

Title to real estate can not be tried in an action of assumpsit. The action of ejectment is the only appropriate remedy for that. But to this rule are many exceptions. 89 Am. Dec. 427-436: cases. *Trespass to try title.* 2 Waterman on Trespass, 584-594: cases; Newell, Eject. 877-884: cases.

KING v. ORE. S. L. R. R.: L.C. 205.

KINKEAD v. U. S.: *See* Bright v. Boyd.

KINLOCH'S CASE (1746), Foster, Crown Law, 16, 1 Lead. Crim. Cas. (B. & H.) 440-461, n., 1 Bish. C. L. 996, 998. *Cited*, § 120, Hughes' Proc.

Former jeopardy; felony; discharge of jury without a verdict, when permissible. Kinloch's. Mere silence, without objection expressed, is no waiver. S. v. Richardson, 47 S. C. 166, 35 L. R. A. 238; Upchurch v. S. (1896), 36 Tex. Cr. Rep. 624, 44 L. R. A. 694, ext. n. *Disagreement of jury no jeopardy.* U. S. v. Perez. *Former jeopardy; when it attaches.* U. S. v. Perez; Roberts v. S. (1853), 14 Ga. 8, 58 Am. Dec. 528-549, ext. n.

New trial; whether jeopardy attaches. C. v. Arnold (1884), 83 Ky. 1, 4 Am. St. 114, ext. n.; C. v. Green (1822), 17 Mass. 515, 1 Lead. Crim. Cas. (B. & H.) 554-592 (under modern rule no jeopardy for new trial), 1 Bish. C. L. 110, 972, 976, 1003, 1 Wh. Ev. 398; Simmons v. U. S. (1890), 142 U. S. 148, 154; Windsor, L. R. 1 Q. B. 289, 390, 6 Best & S. 143 (118 E. C. L. R.); Van Fleet, For. Adj. 652; Campbell v. S. (1836), 9 Yerger (Tenn.), 333, 1 Lead. Crim. Cas. (B. & H.) 592-599, n., 30 Am. Dec. 417 (general counts; acquittal for any one count is jeopardy, and no second trial for that count); Bish. C. L. 994, 1004.

Practice; procedure. C. v. Fitzpatrick (1888), 121 Pa. 109, 1 L. R. A. 451, n., 6 Am. St. 757, Whart. Cr. Pl. & Pr. 435-520, 1 Bish. Crim. Proc. 808-817; Clark, Crim. Proc. 382-407, 9 Encyc. Pl. & Pr. 630-641 (plea of).

KIRKSTALL BREWERY CO. v. FURness R. R., L. R. 9 Q. B. 468; 2 Wh. Ev. 1177, 1180.

Agent's admissions; Res gestæ. The railroad was sued for a parcel supposed to have been stolen by its servants. The station master had stated to a policeman that a porter had stolen it. *Held:* admissible against the railroad.

Evidence; admissions; agents. Agents, within the "scope of the agency," may bind the principal. U. S. v. Gooding: 202 (where it is cited and stated); Didsbury: 213; Thomson: 342.

KIRKWOOD v. MILLER (1858), 5 Sneed (Tenn.), 455, 73 Am. Dec. 134-149, ext. n. *See* ELECTION OF REMEDIES; §§ 120, 136, 310, 311, Hughes' Proc.

Kirkwood stated: A slave was seized and tied by a number of persons; he was alarmed for his safety and escaped and was killed by a blow from Kirkwood. The killing was not a community of purpose—privity did not expressly enter into the killing, but did into the seizure, which was unlawful, and therefore all were equally liable. This is the doctrine of collateral and tacking intent.

See *Actus non facit reum*, etc.; Bish. Torts, 517-536; *Qui primum peccat*, etc.

Where several set about doing an unlawful act, each is liable for the acts of all, even in criminal law, and *a fortiori* this applies in trespass, where intent is no element. All who embark in a com-

Kirkwood.—
mon illegal cause incur common liability. Spies v. P.; 1 Bish. C. L. 629; Scott v. Shepherd: cases; Grundel, 127 Cal. 438, 78 Am. St. 75; Brown, 126 N. C. 701, 78 Am. St. 677, n.
It is no defense for one to plead the nonjoinder of another equally or more guilty. Burk, 179 Pa. 539, 57 Am. St. 607; *sub*, Stephens v. Myers (assault and battery).
Joint trespassers. Each is liable for the acts of all; they may be sued jointly or severally, and an election about this is no defense to others not sued, and they may be sued at any time. Russell, 141 N. Y. 437, 38 Am. St. 807-820, n.; Warren, 44 Minn. 237, 20 Am. St. 378, n., 4 L. R. A. 48; Tyler v. Pomeroy; K. & S. R. R., 131 Ill. 288, 300, Cool. Torts 133, 1 Wat. Tres. 23, 24; Moir, 16 Ill. 313, 63 Am. Dec. 312-316, n., Pattee, Torts, 83; Losee; Valparaiso, 12 Ind. App. 250, 54 Am. St. 522, n.; Lovejoy.
Who are joint trespassers. If several engage in playing ball in proximity to the highway, and the ball is so thrown as to strike and injure a passenger, all the players are joint trespassers.
Vosburg v. Moak (1848), 1 Cush. 453, 48 Am. Dec. 613, n. (infants; boys liable like adults); 1 Wat. Tres. 33, n., 62, 73 Am. Dec. 138, 1 Thomp. Neg. 390, Suth. Stat. 277. One acquiring stolen property is a trespasser. Hilberry v. Hatton (1864), 2 H. & C. 822, 24 Am. St. 812, Moak, Underh. Torts, 581, 1 Add. Torts, 570, 2 Kent, 616. A thief conveys no title. Bentley.
All connected with an illegal act are liable, e. g., an illegal assessment. Stetson; Herm. Ex. 418; Barker. *See* ATTORNEYS.
Corporations liable like individuals. Craker; Wisconsin R. R., 142 Ill. 9, 34 Am. St. 49, n.; Cameron, 22 Mont. 312, 74 Am. St. 602, n. (directors liable).
Respondeat superior involves rationale of joint trespassers. Hilliard. An employer is liable with an independent contractor, where the employment is perilous. *Sub*, Hay; Scott v. Shepherd.
Effect of judgment against one joint tort feasor upon liability of the other. Blackman, 120 Mich. 377, 58 L. R. A. 410-417, ext. n.
KIRVEN v. VIRGINIA-CAROLINA Chemical Co. (1906), 145 Fed. Rep. 288-296.
Real party in interest, if of diverse citizenship, may sue upon a note made to a nominal payee, although the latter could not sue in a federal court. The law looks at substance, not form. *Cessante ratione.*
Diverse citizenship, if in question, may be raised by the answer and passed upon by the jury, but as an abatement issue and not with issues upon the merits, for the latter concludes upon principles of *res adjudicata*, but abatement issues do not. Therefore the latter should not be passed upon in a general verdict for obvious reasons.
Admissions in pleadings, if immediately withdrawn and a new pleading filed before appearance of the adverse side, are not admissible in evidence. Boileau: 43.
Foreign corporation; contract with, not void, but merely suspended until statute for doing business in a state is complied with. After that a contracting party is estopped from raising an issue. One cannot take and retain an unconscionable advantage. Earl of Oxford's Case.
What is doing business. Cooper v. Ferguson Co.

Kirven.—
Contracts of foreign corporation not void. Kirven (statute limited for moral considerations. § 52. Gr. & Rud.). *Contra:* Tri-State v. Forest Co. (1905), 192 Mo. 404, 111 Am. St. 511, n.: *contra* cases, 4 L. R. A. (N. S.) 688-698. How far valid. S. v. Am. Book Co. (1904), 68 Kans. 1, 1 L. R. A. (N. S.) 1041-1050.
KIRVEN v. VIRGINIA-CAROLINA Chemical Company (1907), —— S. C. ——, 58 S. E. 424.
Res adjudicata is a conserving principle of procedure. It emanates from public policy, and is molded and directed by construction as a basic principle.
Defenses not pleaded are waived. All that could or might have been heard is concluded. Perez: 2*e*.
Recoupment is an independent cause of action. Damage to crops by a noxious fertilizer is not concluded by a judgment on a note given for the fertilizer. The recoupment matter might be presented or withdrawn as a party chooses (dissenting views).
Splitting causes of action not permitted. Perez: 2*e*; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455, stated and applied; Beloit v. Morgan, 7 Wall. 619; Outram: 25; Cromwell: 26; Fayerweather, 195 U. S. 301.
Issues in a collateral action are not conclusive unless presented and actually litigated. Cromwell: 26; Kirven.
Records are irrefragable. Brittain: 50; Mondel: 77.
Code provisions quoted as to counter-claim and recoupment. What could or might have been litigated is held to have been. Perez: 2*e*.
Res adjudicata questions will be viewed in federal courts according to their own decisions. Therein principles settled thereby will be followed. Hancock, 176 U. S. 640; Deposit, 191 U. S. 499; Gunter, 200 U. S. 273.
Recoupment is an independent cause of action; it does not merge in the suit upon a contract from which it arises. Mondel: 77.
KLEPTOMANIA: S. v. McCullough (1901), 114 Iowa, 532, 89 Am. St. 382, n.; McClain, C. L. 572 (defense to larceny). 2 Bouv. Dic. 93.
KNOWLEDGE: 2 Bouv. Dic. 94, And. Dic. 591. McClain, C. L.; Knowingly, Bouv. Dic.
KNOX COUNTY v. ASPINWALL: *See* Hill v. Boston. Estoppel applies to corporations as to persons.
KOLLOCK v. SCRIBNER (1897), 98 Wis. 104-120, 73 N. W. 104. *Defenses not pleaded are waived;* Cromwell: 26; J'Anson: 91; Wisconsin Co.; §§ 28, 37, 41, 42, 50, 193, Hughes' Proc.
Cited, §§ 38, 71, 77, 123, 135, 146, 151, 272, 276, Gr. & Rud.
Court may order a cross bill brought forth as an answer to be replied or demurred to, so as to limit the issues and to narrow proofs.
Courts have inherent power to make and conserve record matter as it may be required by the due administration of justice. Pp. 1-18; § 28, Hughes' Proc.; *Lex non exacte; Boni judicis; Ubi eadem ratio;* Indianapolis R. R.: 223; Bates: 225; S. v. Townley: 225*a*.
Pleadings are to limit the issues and to narrow the proofs. Adams v. Gill; Bliss, Code Pl. 138. In other words, they are to present the real issues. They are to exclude false and sham issues and evidence relating thereto. § 5, Hughes' Proc.; Graver:

Kollock.—
103; 1 Best, Ev. 251, 252.
Limiting the issues reflects the rule in Dickson: 34 (a plea of confession and avoidance overcomes a general denial).
Narrowing the proofs should be considered with Dickson; with the necessity of requiring admissions of facts about which there is no real controversy, and of rejecting irrelevant evidence. C. v. Snelling; Cryps v. Baynton (may order bill of particulars). *See* ADMISSIONS; Dickson: 34; § 5, Hughes' Proc.; §§ 83-123, Gr. & Rud.
KORTRIGHT v. CADY (1860), 21 N. Y. 343, 78 Am. Dec. 145-160, ext. n.; Jones, Mort.
Tender of amount due discharges a lien. Hauswirth: 51.
KRAMER v. HALSEY: L.C. 299.
KROM v. SCHOONMAKER (1848), 3 Barb. 647, Ewell, Ld. Cas. Inf., Id. & Cov. 638; Burdick's Torts, 60.
Insane persons are liable for their torts. An insane justice of the peace liable for his trespass. Krom. Justices of the peace are not liable for judicial acts. Coleman, 113 Ala. 323, 59 Am. St. 111, n. Judicial officers, their liability for judicial acts. Lange: 159; Marshalsea; Busteed. Insane persons are liable for their torts. Tucker, 151 Ind. 332, 44 L. R. A. 129, n.; Morse, 17 Vt. 499, 44 Am. Dec. 349. *See* Williams, 157 N. Y. 541, 68 Am. St. 797, s. c. 42 Am. St. 743, ext. n., 26 L. R. A. 153. Insane persons, when liable for contracts. Molton: 413; McNaughten's Case: 195 (liability for crime).
Defamation cannot be committed by the insane. Yeates, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; Burdick's Torts, 50.
KUSWORM CASE: *See* City National.
KYLE v. KAVANAUGH: L.C. 348.
LABORER: 24 Cyc. 810-814.
LABOR UNION: Liability of members for enticing employes to break a contract. Allen. *See* CONSPIRACY; 2 Bouv. 97-99; And. Dic.; 10 Am. Cr. Rep. 240. Contract that one shall not belong to. McClain, C. L. 55.
24 Cyc. 815-840.
LACHES: Does not cure what was originally void. *Quod ab initio non valet in tractu,* etc.; Pennoyer: 58; *Vigilantibus,* etc.; 1 Bouv.; And. Dic.; 14 Mews' E. C. L. 1739; 6 Cyc. 297 (Cancellation), 7 *id.* 875-922 (Commercial paper).
Is defensive matter and is raised in defense. Pratt Co., 135 Ala. 452, 93 Am. St. 35; Phillips, 53 W. Va. 543, 97 Am. St. 1040.
Demand for relief should be prompt. See EQUITY; WAIVER; 14 Mews' E. C. L. 1715; LIMITATIONS.
LAIDLAW v. ORGAN: See *Caveat emptor.*
LAMB v. DAY (1836), 8 Vt. 407, 30 Am. Dec. 479. Six Carpenters' Case: 165.
LAMBORN: *See* VOLUNTARY PAYMENTS.
LAMPLEIGH v. BRATHWAIT: L.C. 301.
LAND: What is, under statute of frauds. Crosby; Ans. Conts. 61. Contracts relating to. *See* REAL ESTATE; DEEDS; Ans. Conts. 232-235; Bouv., And. Dic. Public lands. And. Dic. 595; 2 Bouv. 125-129.
LANDLORD AND TENANT: Willison v. Watkins (Tenant cannot dispute landlord's title); Sexton v. Chicago Storage Co. (assignments of lease); Dumpor's Case; Horner v. Leeds (construction of lease). *See* LEASE; COVENANTS; CONDITIONS; STATUTE OF FRAUDS; 8 Mews' E. C. L. 697-1288. Rent. 2 Bouv. Dic. 876; 24 Cyc. 845-1477.
Landlord may expel tenant without process, when. Taylor v. Cole, *sub, Salus populi,*

Landlord.—
etc.; 3 Suth. Dam. 841-876, 39 L. R. A.: cases; Smith, 115 Mich. 340, 69 Am. St. 575, n. *Notice to quit.* 2 Bouv. Dic. 518-520; Willison. *Repairs.* 2 Bouv. Dic. 881; West Chicago Ass'n, 192 Ill. 210, 85 Am. St. 327, n. *Tenant must rebuild premises, when.* Hallet v. Wylie. *Eviction.* Royce. Renewal of leases by holding over. Clayton. Holding over; what is. Herter, 159 N. Y. 28, 70 Am. St. 517-538, n.; Clayton. Landlord may enjoin breach of lease. Steward, 4 Sandf. Ch. 587; 2 High, Injunc. 1143. *Or waste.* Garth v. Cotton; Steward. Contracts between landlord and tenant. 1 Chit. Conts. 440-516; § 143*a*, Hughes, Conts. Tenant may contract to rebuild destroyed premises. Hallett; Polack. "Cropper" is not a tenant. He cannot sell his interest until it is set out. Kelly, 117 Wis. 620, 98 Am. St. 951.
Occupation of premises as a servant and as a tenant. Bourland, 79 Ark. 427, 4 L. R. A. (N. S.) 698-729, ext. n.
Dangerous premises; who liable for. Todd v. Flight; Shipley v. Fifty Associates.
Who must keep premises in safe repair. Todd; Shipley.
Sub-letting of leased premises. Mitchell, 80 Ark. 411, 117 Am. St. 89-101, ext. n.
Warranty of premises. See *Caveat emptor;* Dutton: 381; Cleves: 383; Smith ("Bug Case"): 382.
Receiver of assignee; liability of for rent. Link-Belt Co., 195 Ill. 413, 59 L. R. A. 673-698, ext. n.
Liability of lessor to third persons of real and personal property. Griffin, 128 Mich. 653, 92 Am. St. 496-559, ext. n.
Generally: 2 Bouv. Dic. 115-125; id. 876 (rent); And. Dic.; 3 Suth. Dam. 841-876.
LAND OFFICE: Bouv. Dic.
LANE v. DORMAN (1841), 4 Ill. 238-245, 36 Am. Dec. 543; *cited,* in *Murray:* 219.
Courts are bound by their records. A court of appellate jurisdiction only can consider evidence presented by the right record and in the prescribed way. Planing Mill: 2*d*. When constitutions have provided an express way no other way can be implied. *Expressio unius. See* APPELLATE PROCEDURE.
Consent of parties cannot avail against the above propositions relating to judicial procedure and the division of state power. The mandatory requirements of a constitutionalism cannot be waived or dispensed with. Garland: 60; Campbell: 2; Campbell v. Greer: 2*a*; §§ 56-61, Gr. & Rud.
The division of state power is a conserving principle. Lane; Murray: 219; Dennett: 145. § 96, Gr. & Rud.
Courts of every grade should uphold the constitution and vindicate its provisions as paramount law. Marbury: 142-146; *In præsentia majoris;* 8 Cyc. 797. *See* CODES; CONSTRUCTION.
LANFEAR v. MESTIER: L.C. 181.
LANGABIER v. FAIRBURY R. R.: L.C. 174*a*.
LANGE v. BENEDICT: L.C. 159.
LANGMEAD v. MAPLE (1865), 18 C. B. 255 (114 E. C. L. R.). *Cited,* § 129, Hughes' Proc.
Res adjudicata defenses; rules for construing a record. Langmead; Martin v. Evans; Greeley; Harvey v. Richards; Barrs v. Jackson: Mondel: 77; Wells on *Res adjudicata.*
Dismissal of bills in equity. Langmead; Sto. Pl. 791, 794. *Change of form of action, not permissible.* Martin v. Evans. See *Res adjudicata.*

LANGRIDGE v. LEVY (Levy v. L.) (1838), 4 M. & W. 337, 2 *id.* 519, 7 D. P. C. 27, 2 Smith, C. Torts, 497, 46 L. R. A. 33-122, 36 Am. St. 815 (excellent *resume* of princip.e), 2 Benj. Sales, 643-647, 2 Mech. Sales, 878, 1 Thomp. Neg. 233, Bro. Max. 785, Moak, Underh. Torts, Rule 8, p. 24; 1 Add. Torts, 38, 2 *id.* 1174, 1208, Bigl. Lead. Cas. Torts, 38, 2 Chit. Conts. 1038, Ans. 160, Whart, 239, 10 Mews' E. C. L. 60, 2 Smith, L. C. 1321-4323, 9th ed.; Wells v. Cook (1865), 16 O. St. 67, 88 Am. Dec. 436; Cool. Torts, Bish.; 1 Suth. Dam., Whart. Neg.; Shear. & Redf., Thomp., 2 Pars. Conts. 905, 3 *id.* 194, Bigl. Fr. 9, 37 Minn. 468, 5 Am. St. 866, 2 Kent, 490, Busw. Pers. Inj. 97. *Cited,* §§ 24, 128, Hughes' Conts., p. 41; §§ 150, 342, 345, 347, Hughes' Proc.; § 296, Gr. & Rud.

Langridge stated: L., Sr., bought of Levy, a dealer, a gun, upon these representations: "Warranted this elegant twist gun by Nock, with case complete; made for his late Majesty, George IV.; cost 60 guineas, can be had for 25." L., Jr., was using this gun in an ordinary way, when it burst and blew off his hand. He sued Levy for damages, who defended, *inter alia,* upon the ground there was no privity between him and L., Jr., the plaintiff. But this defense was untenable.

Tollit v. Sherstone (1839), 5 Mees. & W. 283; Polhill, *sub,* Sturdivant: 410; Moak, Underh. Torts, Rule 8.

False representations. Chandelor: 374; Pasley: 375; Polhill; 2 Sm. L. C. 1301-1341, 9th ed. Remoteness no defense when the injury is natural, direct and probable consequence of the act. Squib Case; Chubbuck, 37 Minn. 466, 5 Am. St. 864; Gilson v. Delaware Canal Co., *ante. In jure non remota, etc.* Thomas v. Winchester (poisonous drug under harmless label). Privity in torts and contracts. Buckley, 110 Cal. 339, 5 Am. St. 88; Winterbottom; 92 Am. St. 497, ext. n.; Mech. Sales, 878; Lewis, 111 Cal. 39, 52 Am. St. 146; Heaven; 46 L. R. A. 33-122, Zane, Banks, 250; 66 Cent. L. J. 461: cases.

LANGUAGE: All is imperfect. § 145, Hughes' Conts.; Bouv. Dic.

Imperfections and uncertainties. Bro. Max. 687; And. Dic. (Latin—*Mala grammatica,* etc.)

Improper use of criminal. McClain, C. L. 26. *See* § 312, Gr. & Rud.

LANING v. N. Y. R. R.; Hilliard.

LANSDOWN v. LANSDOWN (1730), Mos. (Eng.) 364, 37 Eng. Reprint, 605, 2 Jac. & W. 205, Adams' Eq. 190, Pom., Sto., Bisph., 3 Pars. Conts. 353, Perry, Trusts, Whart. Ev., Brown, Jurisdic, Mews' E. C. L.

Cited, § 113, Hughes' Conts.

Lansdown stated: One of four brothers, intermediate in age, died, owning realty, which both the older and younger brother claimed. They submitted their claims to a "school teacher," who decided that land always descends, never ascends, and that therefore the younger was the heir; so the elder thereupon executed and delivered a release. Later he learned the mistake and sought relief. *Held,* that the younger must convey to the older. 1 Sto. Eq. 125.

Accident and mistake; relief from. Hunt, Brown and Gordon cases; 2 Pom. Eq. 188-192; Langston, 8 Bligh. (N. S.), 167, 5 Eng. Reprint, 908; Brown, Jurisdic, 202.

Lansdown.—

Re-execution, correction, rescission and cancellation. Adams, Eq. 402-452; Bisph., 2 Beach, Conts., Mech. Sales; Brown: 347.

LARCENY: McClain, C. L. 534-620; P. v. Miller (1902), 169 N. Y. 339, 88 Am. St. 546-608, ext, n.; 2 Bish. C. L. 757-904, 3 Gr. Ev. 150-162, 2 Bish. Cr. Proc. 696-780; R. v. Thurborn, B. & H. Lead. Cr. Cas., Bish. Stat. Crimes, 410-562; S. v. Kallaher (1898), 70 Conn. 398, 66 Am. St. 116, n.; 3 Crim. Def. 467, 5 *id.* 393-638, 8 Crim. Law Mag. 131-147; Clark, Crim. Cas. 330-394; 4 Mews' E. C. L. 1313-1423; Bouv., And.; 25 Cyc. 1-160.

Stealing property in one state and carrying it into another, when larceny. C. v. Holder (1857), 9 Gray 7, 2 Lead. Crim. Cas. (B. & H.) 377-392, Clark, Crim. Cas. 452, Chaplin, Crim. Cas. 137, 1 Bish. C. L. 141, Ror. Interstate Law, 318, 8 Rul. Cas. 149: cases; 2 Am. Crim. Rep. 355. *C. v. Uprichard* (1855), 3 Gray (Mass.) 434, 2 Lead. Crim. Cas. 371-377, 63 Am. Dec. 762; 5 Crim. Def. 501, 1 Bish. C. L. 141, 3 Gr. Ev. 152, 2 Ror. Intst. Law. 310, 318, 325, 12 Mont. 94, 15 L. R. A. 725; McKenzie v. S. (1894), 32 Tex. Crim. Rep. 568, 40 Am. St. 795, n.; S. v. Morrill (1896), 68 Vt. 60, 54 Am. St. 871; Stanley v. S. (1873), 24 O. St. 166, 15 Am. Rep. 604, 1 Bish. C. L. 140, n. (criticising the case), Clark, Crim. Cas. 451; S. v. Kief (1892), 12 Mont. 92, 15 L. R. A. 722, n.; Strouther v. C. (1895), 92 Va. 789, 53 Am. St. 852, n. Cited § 120, Hughes' Proc.

Actual and constructive possession. A miller adulterating an article left with him to grind commits larceny. C. v. James (1823), 1 Pick. 375, 2 Lead. C. C. (B. & H.) 181-204, Chaplin, Crim. Cas. 304, 1 Bish. C. L. 141, 583, 2 id. 833, 834, 868.

Tapping gas pipes; continuous taking. Woods v. P., 7 L. R. A. (N. S.) 521-525, n.

Elements. S. v. Homes; R. v. Thurborn; P. v. Miller (1902), 169 N. Y. 339, 88 Am. St. 546-608 (General *resume*); McClain, C. L.; 8 Am. Crim. R. 345.

Money paid by mistake, if retained after demand, is larceny. Bergeron, 106 Wis. 377, 80 Am. St. 33, n. *See* Cooper v. C., 110 Ky. 123, 52 L. R. A. 136, ext. n.

Dishonest gambling; when larceny. S. v. Skilbrick (1901), 25 Wash. 555, 87 Am. St. 784, n., 9 Am. Cr. Rep. 516; S. v. Ryan; R. v. Buckmaster; Defrese v. S.

Larceny by trick. Aldrich v. P., 224 Ill. 622, 115 Am. St. 166, 7 L. R. A (N. S.) 1149, n.

Possession by fraud. Aldrich v. P., *supra.*

LATA CULPA DOLO AEQUIPARATUR: Gross negligence is equal to fraud. Gross negligence supplies malice.

LATERAL SUPPORT: 2 Bouv. Dic. 140-142. *See* EASEMENTS: cases.

LATHROP v. CLAP (1869), 40 N. Y. 328, 100 Am. Dec. 493-515, ext. n. Proceedings supplemental to execution; code provisions, when a substitute for creditors' bills. *See* CREDITORS' BILLS; *Boni judicis.* Kollock; Crowns. § 322, Hughes' Proc.

LAW: 2 Bouv. Dic. 144-148, 151 (various definitions); *Lex;* 2 Bouv. Dic. 195; *Lex est sanctio,* etc.: Law is a sacred (sovereign) sanction commanding what is right and forbidding what is wrong. *See* EQUITY; MAXIMS: Hughes' Proc.

Study of. See FIRST LESSONS; §§ 42-72, Gr. & Rud.

Matter of, need not be pleaded. Starbuck: 263; Green: 90. *See* CONCLUSIONS OF LAW; *Ex facto oritur jus;* Bliss, Pl. 175.

Law.—

It is not necessary to state matter of which the court takes notice ex officio. It is unnecessary to state matter of law. And. Steph. Pl. 219; cases.

What will be judicially noticed. Lanfear: 181.

Sources of law. 2 Bouv. Dic. 1014; And. Dic. *See* MAXIMS.

Practice teaches better than by rules alone.

Multa multo exercitatione facilius quam regulis percipies.

Is an entirety. *See* pp. 22-24, 31, § 1, Hughes' Proc.

Importance of law to government. §§ 77, 118-123, Gr. & Rud. The right of government to exist depends upon its prescription and vindication of just and proper laws. *See* Declaration American Independence.

LAW OF THE CASE: Hastings v. Foxworthy (1895), 45 Neb. 676, 34 L. R. A. 321-350, ext. n.; Hodson, 14 Utah, 402, 60 Am. St. 902; Louisville R. R., 99 Ky. 427, 59 Am. St. 467; Thompson, 168 U. S. 451; Smith, 24 Colo. 527, 65 Am. St. 251 (facts must be the same); March, 121 Cal. 419, 66 Am. St. 44, n. (evidence must be the same); Case, 100 Wis. 314, 44 L. R. A. 728; Hayne, Appeal, 291; 180 U. S. 8; Priewe, 103 Wis. 537, 74 Am. St. 537; Bealey, 158 Mo. 515, 81 Am. St. 317, n.

Coram non judice proceedings are never the law of the case. *See* Id.; Horan: 85.

Law of the case arises from an opinion—a decision. Res adjudicata depends on a judgment. *See* RES ADJUDICATA; also see Great West Min. Co., 12 Colo. 46, and same case, 14 Colo. 90, 104 (doctrine of, ignored); and in the latter case, *held*, that a judgment without jurisdiction of the person is only voidable, unless the record shows the fact. *See* Needham. *Legis ligendi et refigendi consuetudo periculosissima.*

LAW OF THE ROAD: *Keep to the right is the law of the road.* Cotton v. Wood (1870), 8 C. B. (N. S.) 568 (98 E. C. L. R.), Thomp. Neg. 364, n.; cited, 47 Am. St. 374, Cool. Torts, 1 Add. 33, 549 Bigl. L. C., Whart. Neg., Shear., Hutch. Carr.; Riepe, 89 Iowa, 82, 48 Am. St. 356-381, ext. n. (instructive *resume*); Elliott, Roads & Streets, 618.

Collisions on highways. See Davies; Brown, *sub* Fletcher v. Rylands; Squib Case.

The rider of a bicycle is not required to give way to a heavily-laden wagon when turning a corner and keeping on the right side of the street, as required by the law of the road and the express terms of the ordinance, unless some apparent necessity is shown for an exception to the rule. Foote, 195 Pa. 190, 48 L. R. A. 74, n.; Davies. One riding a bicycle, as he approaches a corner, keeping on the right side of the street, has a right to assume that the driver of a wagon approaching the corner from another direction will keep to the right, if they meet, so that the bicycle can pass between the wagon and the curb. Foote, *supra*. The bicycle or light vehicle must give way to heavily laden wagon only when there is reason for the exception. Where there is no reason for the exception, the general rule prevails. Foote, *supra*.

LAWRENCE v. FAST: L. C. 132.

LAWRENCE v. FOX (1869), 20 N. Y. 268, Williston Conts. 526, Huff. & Wood. 422, Keener, 771, Harriman, 363. In some quarters this case has been made very prominent. S. P. Hendrick: 319.

LAWS OF THE LAND: *See* INTRODUCTION; SUPREME LAW. *Include certainty. See* CERTAINTY; DUE PROCESS OF LAW.

Incidents annexed by, and included within. Expressio eorum, etc.; *S. v. Baughman.*

Include procedure. See CONSTITUTIONAL PROCEDURE; DUE PROCESS OF LAW; Taylor v. Porter; S. v. Baughman; pp. 8-14, Hughes' Proc.

Defined; means "due process of law." Smith Construc. 593, 594; Cool. Const. Lim. 429, 509.

Protection under. Cool. Const. Lim. 429-509.

Civil liberty depends on right to sue, and be protected in courts. Marbury: 142. *See* CIVIL RIGHTS.

LEA v. LEA: L.C. 30.

LEADING CASE: Its uses. *See* INTRODUCTION, Hughes' Proc.; Preface, Hughes' Conts.; Bouv. Dic.

LEADING CASES: What is a leading case cannot be acceptably defined for all. No doubt the cases selected by authors and reprinted and annotated as leading all persons will accept as leading cases. Many of these cases are reprinted in the English Ruling Cases, but the word "ruling" was adopted from considerations of a distinguishing title for the series; the Ruling Cases present leading cases.

Comprehending a rule to be expressed, discussed and found, jurisprudents, as suits their convenience, select cases by means of which to present such rules and the matter they have for elaboration. From this viewpoint great liberty is claimed in selecting and classifying; any case so selected is called a leading case.

Those essaying to teach the "case system" select cases as suits themselves. Many professors have a predilection to teach only the cases they have selected and reprinted. *See* observations, Preface, Gr. & Rud.; CASE SYSTEM; Chandelor v. Lopus: 374. Many teachers are very partial to the decisions of certain courts; they like the decisions of "native sons," rather than the most widely found and cited cases. To illustrate: We may well call *Armory v. Delamire:* 180 an "Imperial Case." It illustrates the application of *Omnia præsumuntur contra spoliatorem.* However, there is no concord as to the convenience and cosmopolitan character and worth of *Armory.* Likewise we might mention *Scott v. Shepherd,* or *Cumber v. Wane:* 311. Many seem to assume that the late case in some states should be substituted for the old and well worn cases, which have worn best.

The cases that next follow, numbered for convenient reference from 1 to 417, represent important rules and principles. In relation to each is the rule or maxim which it illustrates. Throughout this work they are led to by the abbreviations "L. C." (Leading Case); or in a more condensed way thus, *Windsor:* 1. How these cases support all parts of this work and are thus indicated and led to should be clearly perceived. They next follow.

E.F.F.
12/11/10